

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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:
CSX TRANSPORTATION, INC., :

:
Plaintiff, :

:
vs. : Civil Action No1
: 1:05-DV-00338

ANTHONY A. WILLIAMS and :
DISTRICT OF COLUMBIA, : Hon. Ellen Segal
: Huvelle

Defendants. :

:
----- x

Washington, D.C.
Friday, March 4, 2005

The deposition of JOSEPH C. OSBORNE,
JR., called for examination by counsel for
Defendants, pursuant to notice, in the offices of
the Attorney General for the District of Columbia,
Sixth Floor, 441 4th Street, N.W., Washington,
D.C., convened at 9:12 a.m., before Emma N. Lynn,
a Notary Public in and for the District of
Columbia, when were present on behalf of the
parties:

APPEARANCES:

On Behalf of Norfolk Southern
Railway Company and the
Deponent:
G. PAUL MOATES, ESQ.
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C O N T E N T S

WITNESS EXAMINATION BY COUNSEL FOR
 PLAINTIFF DEFENDANTS

JOSEPH C. OSBORNE, Jr.

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THE SIERRA CLUB

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E-X-H-I-B-I-T-S

OSBORNE DEPOSITION

MARKED

No. 1 7

No. 2 31

No. 3 41

No. 4 120

(All Exhibits retained by Ms. Mullen.)

4

1 PROCEEDINGS

2 Whereupon,

3 JOSEPH C. OSBORNE, JR.

4 was called for examination by counsel for the
5 Defendants and, having been first duly sworn by
6 the notary public, was examined and testified as
7 follows:

8 EXAMINATION BY COUNSEL

9 FOR THE DEFENDANTS

10 BY MR. CASPARI:

11 Q. Could you state your full name, please.

12 A. Joseph C. Osborne, Jr.

13 Q. Mr. Osborne, have you ever been deposed
14 before?

15 A. Yes, I have.

16 Q. If I ask you a question that doesn't
17 make sense or you don't understand, please just
18 ask me to rephrase it. Okay?

19 A. Okay.

20 Q. Please make all your responses verbal.

21 A. Okay.

22 Q. If you need to take a break, let us

5

1 know as well.

2 A. Sure.

3 Q. Can you provide us your date of birth,
4 please?

5 A. June 28th, 1950.

6 Q. And with whom are you presently
7 employed?

8 A. Norfolk Southern.

9 Q. And where is the work address for you,
10 sir?

11 A. My work address is 110 Franklin Road,
12 Roanoke, Virginia 24041, I think.

13 Q. And what is your current position?

14 A. I am the group vice president for the

15 chemicals business group.
16 Q. What is your responsibility as group
17 vice president of chemicals?
18 A. I have responsibility for all of the
19 marketing and sales activities of Norfolk
20 Southern's dealings with chemical customers.
21 Q. Does Norfolk Southern's shipment of
22 hazardous materials fall exclusively under the

6

1 chemical division?
2 A. Not exclusively, if you mean from a
3 commercial point of view.
4 Q. Yes. Could you explain what other
5 divisions may have some responsibility in that
6 regard.
7 A. Our AG or agriculture business group
8 has responsibility for commodities like anhydrous
9 ammonia which is considered a hazardous materials
10 commodity.
11 Q. Fertilizers?
12 A. Anhydrous is the feedstock that goes
13 into making fertilizers.
14 Q. In terms of the banned materials under
15 the D.C. ordinance, are you familiar which
16 commodities fall under that?
17 A. Not specifically.
18 Q. Who at Norfolk Southern is your
19 immediate supervisor?
20 A. David, T as in Thomas, Lawson,
21 L-A-W-S-O-N.
22 Q. And what is his position title?

7

1 A. His title is vice president for
2 industrial products.
3 Q. How many vice presidents fall under Mr.
4 Lawson?
5 A. Four.
6 Q. And that's including you, sir?
7 A. Yes. That includes me.
8 Q. Would you briefly state your
9 educational background.
10 A. I have a BA in history and a MA,
11 Master's, in history, both from the University of
12 Delaware.

13 (Osborne Exhibit No. 1 was
14 marked for identification.)
15 BY MR. CASPARI:
16 Q. Sir, I am handing you what has been
17 marked as Osborne Exhibit No. 1. I believe all
18 parties have been provided a copy.
19 Do you recognize that document?
20 A. Yes, I do.
21 Q. Could you state for the record what
22 that document is?

8

1 A. It is an affidavit that I signed on
2 February 15th, 2005.
3 Q. Sir, did you utilize or rely upon any
4 documents in preparing this affidavit?
5 A. Yes, I did. And I don't mean this to
6 be inclusive, but the traffic data, the numbers
7 that are referenced in the document, were produced
8 by my group and it is part of our contribution to
9 developing the document.
10 Q. And by your "group," can you describe
11 who that group is or was?
12 A. My group is the chemicals business
13 group. There are a number of individuals in that
14 group who have various functions who, among other
15 things, can produce information that was necessary
16 to produce this document.
17 Q. In terms of the mileage, number of
18 shipments, take, for example, paragraph 7, it
19 states "NSR transported approximately 366,000
20 shipments of hazardous materials during 2004."
21 Is that the type of information that
22 would have been collected by your group?

9

1 A. That is correct.
2 Q. And how would they go about obtaining
3 that data?
4 A. By making inquiries into Norfolk
5 Southern's computer databases.
6 Q. Can you identify those persons who
7 would have extrapolated that data, actually
8 extrapolated that data from the computers?
9 A. There would be two people in
10 particular, both of whom report to me. One name

11 is Bob Plain, P-L-A-I-N. He is my marketing
12 director. And the other is a gentleman named Phil
13 North, N-O-R-T-H. And his responsibility is
14 managing statistics and so forth for the chemicals
15 business group.

16 Q. Did you direct them to pull this data
17 together for purposes of this affidavit?

18 A. That's correct, yes.

19 Q. Do you remember when you had them do
20 that?

21 A. Oh, I don't recall specifically.

22 Q. Do you know how long it took to compile

10

1 the data?

2 A. No, I do not.

3 Q. Other than the data pulled by your
4 group in terms of the numbers, are there any other
5 documents used by you in swearing to this
6 affidavit?

7 A. Not that I recall.

8 Q. Who at Norfolk Southern authorized you
9 to execute this affidavit?

10 A. Two members of Norfolk Southern's law
11 department and my immediate supervisor.

12 Q. And that's Mr. Lawson?

13 A. Mr. Lawson, correct.

14 Q. The data pulled by Mr. Plain and Mr.
15 North, did you ever see that in a paper form?

16 A. Yes, I did.

17 Q. And what type of form would it be in?
18 Would it be printouts, an Excel spread sheet, a
19 report? Can you describe that, please?

20 A. It was a computer printout that showed
21 basically the numbers and the information that you
22 see here in item 7.

11

1 Q. Without having looked at the data from
2 Mr. Plain and Mr. North, how would you describe
3 your familiarity with the subjects that are
4 addressed there, same paragraph 7?

5 A. Could you repeat the question.

6 Q. Sure.

7 For example, paragraph 7 approximates
8 "366,000 shipments of hazardous materials during

9 2004."

10 If you had not seen the data from Mr.
11 Plain or Mr. North, would you be generally
12 familiar with how many shipments Norfolk Southern
13 would have shipped of hazardous materials during
14 2004?

15 A. I mean, you are asking me a very
16 general question. Perhaps the way to answer it is
17 generally I am familiar that Norfolk Southern
18 handles a number of hazardous materials shipments
19 in one year.

20 Q. If you had not seen the data, would you
21 be able to approximate how much shipments Norfolk
22 Southern does in a year of hazardous materials?

12

1 A. Yes, I would.

2 Q. And would it be close to what the data
3 actually represented?

4 A. I can't answer that.

5 Q. I ended up turning an easy question
6 into a hard one. I apologize for that. I was
7 just trying to get to your general familiarity
8 with how much Norfolk Southern shipped of
9 hazardous materials during 2004.

10 A. Okay. Understood.

11 Q. Just to clarify your answer, without
12 the benefit of the computer data would you be able
13 to approximate how many shipments of hazardous
14 materials Norfolk Southern transports in a year?

15 A. No, I would not.

16 Q. In paragraph 3, you describe Norfolk
17 Southern as "a major freight railroad." What is a
18 Class 1 railroad?

19 A. I can't answer that in terms of the
20 legal definition of a Class 1. I just understand
21 that Class 1 railroads are among the largest
22 railroads. There are certain revenue thresholds

13

1 that they exceed, and I don't know what those are,
2 but I understand Norfolk Southern exceeds those
3 revenue thresholds and thus qualifies as a Class 1
4 railroad.

5 Q. I am looking at paragraph 5. You used
6 the term "trackage rights."

7 Can you explain what trackage rights
8 are?
9 A. Trackage rights in the railroad
10 business means an agreement between two carriers,
11 two railroads, to allow one railroad to operate
12 over the right of way of the other railroad.
13 Q. And to operate --
14 A. Operate trains. Excuse me. I should
15 have said trains.
16 Q. And as you state here, "to operate its
17 own trains." So CSX, if they had trackage rights
18 over a particular section of NSR's tracks, they
19 would have the rights to operate their own engines
20 over your rails?
21 A. Under certain conditions, yes.
22 Q. And are those conditions contained in

14

1 the trackage rights agreements?
2 A. That is correct.
3 Q. Are you aware of how many miles of
4 track Norfolk Southern owns itself?
5 A. I don't know the specific number of
6 miles of right of way.
7 Q. You used the term "right of way." Does
8 that include track that Norfolk Southern has the
9 rights to operate over pursuant to trackage rights
10 agreements?
11 A. I would not assume that.
12 Q. I have seen perhaps in this affidavit,
13 but maybe in some other Norfolk Southern filings,
14 the figure of 21,500 miles of track.
15 Does that figure help you remember how
16 much track Norfolk Southern owns?
17 A. To help answer the question, I believe
18 that Norfolk Southern owns somewhere in the 20,000
19 miles of right of way in its system.
20 MR. MOATES: I think if you look at the
21 affidavit you are referring to the NTB, it says
22 "owns and operates."

15

1 BY MR. CASPARI:
2 Q. Owns and operates?
3 A. Yes.
4 Q. Does that figure include portions of

5 other carriers' tracks that NSR has the right to
6 operate over?
7 A. Correct.
8 Q. It does?
9 A. Yes. For instance, it has the right to
10 operate over Amtrak's Northeast Corridor, to use
11 an example.
12 Q. Who within NSR has the authority to
13 enter into trackage rights agreements?
14 A. I am not sure.
15 Q. Is it fair to say that you don't have
16 the authority to enter into trackage rights
17 agreements on behalf of NSR absent higher
18 authority?
19 A. That is correct.
20 Q. Are you aware of how many different
21 trackage rights agreements NSR is currently a
22 party to?

16

1 A. No, I am not.
2 Q. Are you aware of how many different
3 railroad companies NSR has trackage rights
4 agreements with?
5 A. No, I'm not.
6 Q. Have you ever heard the term "general
7 manager agreements"?
8 A. No. I don't recall.
9 Q. Other than trackage rights agreements,
10 are there any type of emergency type agreements
11 that railroad companies have between themselves
12 like for the hurricane in Florida, for emergency
13 purposes to use other rail companies' tracks?
14 A. Yes, I am aware of those type of
15 agreements.
16 Q. To the extent you are aware of them,
17 can you describe those agreements for the record?
18 A. In general, they are agreements between
19 rail carriers that allow for a voluntary
20 specifically and temporary rerouting of traffic
21 from a carrier who is affected by some
22 obstruction, some reason that they can't use right

17

1 of way, to use another carrier's right of way to
2 keep traffic moving.

3 Q. Have you ever read any of the trackage
4 rights agreements that NSR has with any other rail
5 company?

6 A. Yes, I have.

7 Q. Do you know from memory which trackage
8 rights agreements you may have reviewed?

9 A. One of the trackage rights agreements
10 that I reviewed is the trackage rights agreement
11 made between Norfolk Southern and CSX pursuant to
12 its acquisition of ConRail, including the right to
13 operate over CSX's, what is referred to in my
14 affidavit, as the north-south I-95 corridor.

15 Q. If I understand your testimony, Norfolk
16 Southern does have trackage rights over CSX's
17 north-south I-95 corridor?

18 A. That's correct.

19 Q. Can you be more specific in terms of
20 which part of the north-south I-95 corridor or
21 does that name in itself describe a particular
22 mileage or location?

18

1 A. The segment of track is sometimes
2 referred as the Landover Line, but it is the old
3 ConRail freight line between Landover on the north
4 end and RO at the south end of the bridge over the
5 Potomac River, leading to what used to be called
6 Potomac Yard.

7 Q. The north-south I-95 corridor is much
8 longer than that section that you have described.
9 Is that a fair statement?

10 A. I believe so.

11 Q. The area that you have trackage rights
12 on, that you just described, that area is between
13 two interchange points. Is that a fair statement?

14 A. That I don't know. It is between two,
15 what we call, stations.

16 Q. In order for you to use this particular
17 section of CSX's track, is it your understanding
18 that Norfolk Southern would have to have the
19 physical ability to basically get on the track at
20 those two respective locations?

21 A. Could you describe what you mean by
22 "physical ability."

19

1 Q. Sure. You described what was the old
2 Potomac Yard in the south.

3 A. Yes.

4 Q. And Landover Station, I guess, in the
5 north.

6 A. Yes.

7 Q. I don't know if Landover station -- is
8 there a more particular term they use for that
9 point?

10 A. Landover is a station. It also is an
11 interlocking, meaning there are switches that
12 allow trains to go from one track to another. The
13 same switching description applies at a station
14 called RO at the south end.

15 And extrapolating from your question,
16 Norfolk Southern could physically operate a
17 freight train, let's say, from RO to Landover or
18 vice versa, assuming that the crew was either
19 qualified or was manned by a CSX crew to get it
20 over that section of track.

21 Q. Have you reviewed any other trackage
22 rights agreements that NSR has with any other rail

20

1 company?

2 A. Yes, I have.

3 Q. Do you recall which ones?

4 A. I don't recall.

5 Q. Are you aware of how many interchange
6 points NSR and CSX have over their entire rail
7 network?

8 A. I don't know the exact number.

9 Q. Do you know if that data is a matter of
10 public record?

11 A. I don't know.

12 Q. Would you describe those two locations,
13 RO and Landover, as interchange points?

14 A. I said before I don't know.

15 Q. I'm sorry.

16 A. But the reason is that has a very
17 specific meaning, and I'm not clear about whether
18 it is an interchange.

19 Q. What is the meaning of an interchange,
20 when you use that term?

21 A. It is a specific agreement between two
22 carriers as to the location of an interchange

1 point, the conditions under which the interchange
2 point is used, the other related agreements that
3 would need to be in place in order to support a
4 functioning interchange.

5 Q. In terms of how many interchange points
6 there are between Norfolk Southern and CSX, I
7 don't want you to guess, but would you estimate
8 that it is a number around 100 or in excess of
9 100?

10 A. I don't know. I do know there are a
11 number of interchange points simply because I deal
12 with that in my area of business. I just don't
13 have a feel for how many interchanges there are.

14 MR. MOATES: You are talking about
15 across their whole system or just Washington?

16 MR. CASPARI: That's right.

17 THE WITNESS: That's what I assume he
18 meant. With the acquisition of ConRail, the
19 number has changed and I don't have a feel for
20 what that is.

21 BY MR. CASPARI:

22 Q. In terms of the D.C. metropolitan area,

1 do you have an idea how many interchange points
2 Norfolk Southern and CSX have in this area?

3 A. I don't have an idea as to the number.

4 Q. The trackage rights agreements that you
5 have reviewed, do you remember who within NSR was
6 the signatory to that agreement?

7 A. I don't know the name, but it is
8 handled by a department we call the joint
9 facilities group.

10 Q. And are they located in Roanoke as
11 well?

12 A. No.

13 Q. Where are they located, please?

14 A. Atlanta, Georgia.

15 Q. And do you know who is the senior
16 person at the joint facilities group?

17 A. No, I don't.

18 Q. Do you know any point of contact within
19 that department?

20 A. Yes, I do.

21 Q. Can you provide one, please?

22 A. His name is Mark Owens.

23

1 Q. What is your understanding of NSR's
2 reason for entering into trackage rights
3 agreements?

4 A. In general it is for operating
5 convenience and/or where two railroads want to
6 exchange arrangements that benefit both railroads
7 as far as the efficient movement of traffic from
8 point A to point B.

9 Q. Mr. Osborne, I'm not interested in
10 conversations with lawyers, either at Norfolk
11 Southern or from Mr. Moates or outside counsel.

12 Other than Mr. Lawson and Mr. Plain and
13 Mr. North, did you discuss this affidavit with
14 anybody else at Norfolk Southern?

15 A. Except for lawyers, no.

16 Q. Excluding lawyers?

17 A. No.

18 Q. And except for Mr. Lawson, Mr. Plain
19 and Mr. North and any lawyers, did anybody else
20 provide you information that was used in the
21 preparation of this affidavit?

22 A. No.

24

1 Q. I don't think I asked this yet. I
2 apologize if I did.

3 Other than the data provided you by Mr.
4 Plain and Mr. North, were there any other
5 documents used by you in the preparation of this
6 affidavit?

7 A. No.

8 Q. Have you read the D.C. ordinance that
9 is at issue in this case?

10 A. No, I have not.

11 Q. Do you have an understanding through
12 some other means as to prescriptions of the D.C.
13 ordinance at issue?

14 A. Yes, I do, from conversation with my
15 attorneys.

16 Q. Other than conversations with your
17 attorneys, has anybody else apprised you of the
18 contents of the D.C. ordinance?

19 A. Not that I'm aware of. Let me just add
20 one addendum. I have read some press reports
21 about the ordinance. I don't remember which ones.
22 But that would be another form of information

25

1 aside from our attorneys, how I would know
2 something about this.

3 Q. From the press reports what did you
4 glean that the D.C. ordinance, what type of
5 traffic it proscribed?

6 A. I understood that it proscribed
7 hazardous materials shipments within a certain
8 boundary or distance or certain territory within
9 the limits of Washington, D.C.

10 Q. To your knowledge --

11 A. I'm sorry. By rail. Let me add that
12 qualifier.

13 Q. To your knowledge does the D.C.
14 ordinance, if enforced, affect NSR's
15 transportation of hazardous materials through the
16 District.

17 MR. MOATES: I am going to object to
18 the premise of the question because the premise
19 hasn't been established that Norfolk Southern
20 transports any hazardous materials through the
21 District.

22 MR. CASPARI: That's a better way to

26

1 ask it.

2 BY MR. CASPARI:

3 Q. Does NSR transport hazardous materials
4 through the District?

5 A. Currently, no.

6 Q. To your knowledge when was the last
7 time NSR transported materials that would be
8 banned under the D.C. ordinance through the
9 District?

10 A. I can't answer that for two reasons:
11 One, I don't know; but, two, I still don't know
12 what the population of banned materials is.

13 Q. To your knowledge does NSR have any
14 plans, active plans to transport hazardous
15 materials that may or may not be banned through
16 the District?

17 A. None to my knowledge.
18 Q. Sir, is it your understanding that
19 chlorine and liquid propane gas fall under the
20 D.C. ordinance?
21 A. I don't know.
22 Q. I am looking at paragraph 6, just for

27

1 reference. "Common carrier obligation" is a term
2 you use in paragraph 6.

3 Can you describe that a little bit
4 more?

5 A. Yes. Norfolk Southern is a common
6 carrier and by law is required to accept shipments
7 by rail over its right of way as long as those
8 shipments meet certain requirements of both
9 Norfolk Southern as well as Government statutes
10 and regulation.

11 Q. You used the term "statutory." Do you
12 have personal knowledge of what statutes require
13 or mandate this common carrier obligation?

14 A. I personally do not know what specific
15 statutes mandate it. I have been so advised
16 though by our attorneys about this obligation.

17 Q. And in terms of "under current law,"
18 the term you use here in the second sentence, is
19 that kind of the same situation? You know of
20 laws. You don't know what particular laws in
21 terms of what their actual number is?

22 A. No, I do not know the specific citation

28

1 or number that would apply. I just know that
2 under current law we are obligated as I described
3 in that paragraph.

4 Q. You used the term "network." Can you
5 describe what encompasses the NSR's network?

6 A. In very general terms, Norfolk Southern
7 has a network of rail lines that cover most of the
8 states in the United States east of the
9 Mississippi River, and we operate as far west as
10 Kansas City, as far north as the state of New
11 York.

12 Q. Let me try to be a little more
13 specific. Does the network include, for example,
14 the portion of CSX's tracks that NSR has trackage

15 rights over that we discussed earlier between
16 Landover and RO?

17 A. I'm not sure.

18 Q. When you used the term "network," do
19 you know if that was intended to include that
20 portion of the rail network that covers the
21 portion of the tracks that NSR has trackage rights
22 over?

29

1 A. I meant to include as part of the word
2 "network" the places where Norfolk Southern
3 operates its train network, which would include
4 areas where we have trackage rights agreements
5 that are moving traffic today.

6 Q. Are trackage rights agreements the only
7 way to access another company's track? I do
8 acknowledge that you have described emergency type
9 situations. So other than emergency and trackage
10 rights agreements, are you aware of any other way
11 in which a rail company can use the lines of
12 another rail company?

13 A. Not that I am aware of.

14 Q. In paragraph 7 -- we kind of touched on
15 this a little bit before -- you state "NSR
16 transported approximately 366,000 shipments of
17 hazardous materials during 2004." A couple
18 questions regarding that.

19 What are hazardous materials as you are
20 using that terms in this paragraph?

21 A. The definition that we use follows the
22 Department of Transportation -- I am reaching for

30

1 the word. The way the Department of
2 Transportation describes hazardous materials, they
3 list commodities and describe and group them by
4 various hazardous classes. Norfolk Southern uses
5 that classification to describe those commodities
6 that we apply the term "hazardous materials" to.

7 Q. Is that a STCC code? S-T-C-C code? Is
8 that what you are referring to?

9 A. The underlying way in which commodities
10 are grouped are based upon STCC codes. Those STCC
11 codes are used by the Department of Transportation
12 in describing hazardous materials.

13 Q. If I understand your earlier testimony,
14 you don't have personal knowledge as to which
15 commodities are covered by the D.C. ordinance. Is
16 that a fair statement?

17 A. Yes. I have not read the D.C.
18 ordinance, so I don't know what is covered.

19 Q. Mr. Osborne, did you personally type up
20 this affidavit or was it something prepared for
21 your signature?

22 A. This was prepared for my signature.

31

1 MR. CASPARI: If I could have this
2 marked, please.

3 (Osborne Exhibit No. 2 was
4 marked for identification.)

5 BY MR. CASPARI:

6 Q. Sir, I am handing you what has been
7 marked as Osborne 2 and if I could ask you to have
8 a look at that document, please.

9 Mr. Osborne, for purposes of this
10 deposition I intend to ask you just a couple
11 questions about Section 4 on the second page. But
12 I have given you the opportunity to familiarize
13 yourself with this document.

14 Do you recognize this document as the
15 D.C. ordinance involved in this matter?

16 A. It is identified as "An Act in the
17 Council of the District of Columbia." It is not
18 signed, but I will accept your word that's the
19 ordinance that you have been referring to.

20 Q. Very well. Thank you.

21 In Section 4, it discusses the types of
22 hazardous materials that are designed to be banned

32

1 from the District.

2 For example, in Section 4, subparagraph
3 (1)(A), are you familiar with that classification
4 of hazardous material?

5 A. Yes, I am.

6 Q. And how are you familiar?

7 A. It is a commodity or a description of a
8 commodity which Norfolk Southern could handle
9 under its common carrier obligation.

10 Q. Explosives of Class 1, what is Class 1

11 referring to there, if you know?
12 A. In general, the class division
13 notifications refer to the Department of
14 Transportation's descriptions of various hazardous
15 materials.
16 Q. The explosives, can you give some
17 examples of what would fall under the term
18 "explosives"?
19 A. Military shipments, for instance.
20 Q. Military ordnance?
21 A. Yes.
22 Q. Does NSR transport any of the material

33

1 described in Section 4, subparagraph (1)(A),
2 through the District?
3 MR. MOATES: Actually I am going to
4 object on a foundation question. You haven't
5 actually established that Norfolk Southern
6 transports anything through the District,
7 hazardous or otherwise.
8 MR. CASPARI: You can still answer the
9 question.
10 THE WITNESS: None to my knowledge.
11 BY MR. CASPARI:
12 Q. Just to avoid further objections on
13 that line, does NSR transport material through the
14 District?
15 A. Does NSR transport material?
16 Q. Any cars through the District?
17 A. I'm not sure.
18 Q. NSR holds trackage rights?
19 A. Yes.
20 Q. Are you aware of any shipments by NSR
21 on those lines that you have trackage rights to?
22 A. I'm not aware of any shipments on those

34

1 trackage rights.
2 Q. So you are not aware whether NSR
3 operates its own locomotives, its own engines
4 across those lines?
5 A. I'm not aware of that, no.
6 MS. MULLEN: When we reach a good
7 breaking point, I need five minutes.
8 MR. CASPARI: Can we take five minutes.

9 (Recess.)
10 MR. CASPARI: Back on the record.
11 BY MR. CASPARI:
12 Q. Mr. Osborne, I had handed you Osborne
13 Exhibit 2. That was the D.C. -- I represented to
14 you that was the D.C. ordinance.
15 My only other question is, to your
16 understanding is, say, chlorine and liquid propane
17 gas regulated under this particular ordinance?
18 A. I can't -- I don't know if the word
19 "regulated" applies, but those commodities would
20 be covered under these classifications that are
21 described in Section 4, sub (1) and sub (2),
22 because it follows the DOT standard classification

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1 for these types of commodities.
2 Q. So your answer is, yes, they do seem to
3 fall under the language here in this D.C.
4 ordinance?
5 A. Yes, that is correct.
6 Q. I refer you to paragraph 6 in your
7 affidavit.
8 A. Okay.
9 Q. You state that "NSR has a statutory
10 common carrier obligation to provide service upon
11 request by a shipper."
12 Can you explain that a little more?
13 A. If a shipper wishes to ship commodities
14 by rail and they meet both that railroad's
15 requirements as well as meet the regulatory
16 requirements established by the Government, the
17 railroad, in this case Norfolk Southern, has an
18 obligation to transport that commodity over its
19 lines as agreed between the parties.
20 Q. Is it your understanding that materials
21 such as chlorine and liquid propane gas are
22 transported in cars owned by shippers and not

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1 railroads?
2 A. Yes, I understand that that is how it
3 is done.
4 Q. What obligation, if any, under the
5 statutory common carrier obligation does NSR have
6 to accept or provide service when CSX or another

7 railroad company presents material to be shipped
8 to NSR?

9 A. I am going to have to ask you to
10 clarify the question.

11 Q. Sure.

12 You have talked about the obligation to
13 ship something from a shipper.

14 A. That's correct.

15 Q. Could you explain or describe what, if
16 any, difference there is on NSR's common carrier
17 obligation to ship materials presented to them by
18 another railroad company?

19 MR. MOATES: Object to the form of the
20 question.

21 But you can answer.

22 THE WITNESS: This is a difficult

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1 question to answer, but our obligation to ship
2 commodities is to shippers or customers. Our
3 obligation is not to accept a shipment from
4 another carrier. The shipments that we do accept
5 from other carriers are shipments that were made
6 pursuant to the common carrier obligation to
7 customers.

8 BY MR. CASPARI:

9 Q. And what you mean by that is the
10 shipper at the point of origin had somewhat agreed
11 that this would travel over the particular CSX
12 lines and then interchange with NSR lines?

13 A. Correct, to use that as an example.

14 Q. NSR has daily routes across its network
15 that will include travel over other railroad
16 companies' lines. Is that a fair statement?

17 MR. MOATES: Object to the form of the
18 question. What is a "daily route"?

19 BY MR. CASPARI:

20 Q. What I mean by a daily route is a set
21 route. I can't think of any other way to describe
22 it. Just an established route.

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1 Does NSR have established routes that
2 routinely take it over lines that NSR has a right
3 to travel over pursuant to trackage rights
4 agreements?

5 A. You say "take it over." You mean take
6 trains over? Is that what you mean?
7 Q. It was poorly worded, but to operate
8 over.
9 A. Norfolk Southern has certain train
10 movements that utilize trackage rights, to use a
11 general term, on a frequent basis.
12 Q. In paragraph 7, again you refer to
13 "366,000 shipments of hazardous materials during
14 2004."
15 Is that calendar year 2004?
16 A. That's correct.
17 Q. How many shipments of material did NSR
18 transport during 2004?
19 A. Would you say the question again.
20 Q. How many shipments of any material did
21 NSR transport in 2004?
22 A. I don't know.

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1 Q. Do you know how we could obtain that
2 data? Is it a matter of public record, a filing
3 with any Federal agency?
4 A. I believe it is a matter of public
5 record.
6 Q. And what would cause you to believe
7 that?
8 A. For instance, in our annual report, we
9 describe our overall results for calendar year
10 2004. I also believe there are regulatory filings
11 that we do that refer to this.
12 Q. Your annual report, what is that?
13 A. It is a report of our financial results
14 as a company, a report that we make to our
15 shareholders every year.
16 Q. Have you reviewed the 2004 annual
17 report?
18 A. No. I do not believe it is available
19 yet.
20 Q. Did any your supervisors, including Mr.
21 Lawson, review this affidavit before you signed
22 it?

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1 A. I'm not sure.
2 Q. Just referring to chlorine and liquid

3 propane gas, in 2004 did NSR ship either by itself
4 or through interchange agreements chlorine and
5 liquid propane gas through the District of
6 Columbia?

7 MR. MOATES: I am not going to object,
8 but railroads don't ship. Shippers ship.
9 Railroads transport. I think it would help if you
10 use that terminology.

11 BY MR. CASPARI:

12 Q. He has objected to the form of the
13 question. Do you understand the question now?

14 A. I understand the question.

15 To my knowledge, no.

16 Q. And why, if you know?

17 A. Why did Norfolk Southern not transport?

18 Q. Why not?

19 A. The main reason is that the flow of our
20 traffic that you are describing, chlorine, LPG,
21 doesn't move, doesn't naturally move over that
22 route.

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1 Q. Mr. Osborne, has it ever moved through
2 the D.C. route?

3 A. That I don't know.

4 Q. How does NSR move the chlorine and
5 liquid propane gas on its rail network north and
6 south of D.C.?

7 A. The answer I would give is kind of
8 complicated. But if there was such traffic that
9 moved north-south, and to help your question, in a
10 routing that was somewhat parallel to what CSX is
11 doing, our routing would be more along the lines
12 of a Roanoke, Virginia, Lynchburg, Virginia,
13 Hagerstown, Maryland, Harrisburg, Pennsylvania,
14 type of routing.

15 And why it is complicated is it depends
16 upon where it is going to go; that is, what is the
17 ultimate destination of the particular commodity.

18 MR. CASPARI: Can you mark this. This
19 might help. I don't know.

20 (Osborne Exhibit No. 3 was
21 marked for identification.)

22 BY MR. CASPARI:

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1 Q. Mr. Osborne, I am showing you Exhibit
2 Osborne 3 and if you could take a look at that and
3 tell us whether -- you will see this rail line on
4 the left of the page that appears to go through
5 Roanoke and Hagerstown.

6 Is that an accurate description of the
7 Norfolk Southern line you were just referring to?

8 A. I'm not sure. Could you tell me the
9 source for this?

10 Q. Sure. It was, I believe, attached to
11 CSX's motion for preliminary injunction, and it
12 was referenced by a Mr. Gibson in his affidavit.

13 A. Oh.

14 MS. MULLEN: Would it help to have the
15 actual map? You want me to get it?

16 BY MR. CASPARI:

17 Q. Mr. Osborne, would it help to have the
18 actual map?

19 A. I believe I know what is referred to
20 here, but why I asked for the source is that,
21 again, making an assumption about a flow of
22 traffic that would move in a north-south routing,

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1 somewhat parallel to what is shown on this exhibit
2 as the CSX routing, Norfolk Southern has a typical
3 flow that goes Roanoke, Lynchburg, and north up to
4 Manassas and then back west to Hagerstown and up
5 to Harrisburg as is shown on this exhibit.

6 Norfolk Southern could follow the
7 highlighted route going by Harrisonburg,
8 Winchester and Hagerstown. It is just that the
9 structure of our network today favors that first
10 route that I am describing.

11 Q. Assuming a movement from Philadelphia
12 to Petersburg, other than a route identified as
13 Norfolk Southern on this map, the primary
14 north-south route we see here --

15 MR. MOATES: I am going to object to
16 that characterization. He just told you that's
17 not the primary north-south route.

18 BY MR. CASPARI:

19 Q. Correct me if I am wrong. I believe
20 the Roanoke to Lynchburg may be a little
21 different. Correct? Isn't that what you
22 described?

1 A. Yes. The flow of our traffic today, in
2 other words, the way our network operations group
3 tends to route the traffic -- again, I can't be
4 more specific because I don't know enough about the
5 details about what the actual traffic is. But,
6 again, assuming that the traffic moved in a
7 parallel flow as what you are identifying as CSX
8 on this map, what Norfolk Southern would do today
9 is go over to Lynchburg and then north to Manassas
10 Junction and then back west to Hagerstown and then
11 up to Harrisburg.

12 Q. Can you draw that to the best you can
13 with this blue ink pen.

14 A. With all due exceptions to the
15 weaknesses of the map as well as to my
16 understanding of geography, it is, I think, here
17 to here. Again, it is not to scale and I don't
18 pretend to say that it is perfectly accurate.
19 Plus the map has some things missing on it, simply
20 because of the purpose of the map.

21 Q. Are there any other changes to this
22 route that you see referenced here as Norfolk

1 Southern on Osborne Exhibit 3?

2 A. No. Not that I'm aware of. Not that I
3 am aware of.

4 Q. Assuming a route of hazardous materials
5 such as chlorine, liquid propane gas from
6 Philadelphia to Petersburg on Norfolk Southern's
7 lines, is this the route it would travel, the one
8 that is referenced with the blue ink?

9 A. Just to be clear, you are suggesting
10 CSX gives it to Norfolk Southern in interchange at
11 Philadelphia? Is that what you mean?

12 Q. I did not assume that. I was assuming
13 point of origin with Norfolk Southern --

14 A. I see.

15 Q. -- and termination at Petersburg on
16 Norfolk Southern's lines. Is this the route that
17 Norfolk Southern -- is this the most efficient
18 route Norfolk Southern has to ship that material?

19 A. Yes, with one qualification. It would
20 go from Philadelphia, Harrisburg, Hagerstown,

21 Manassas Junction, Lynchburg, Roanoke and then
22 back east from Roanoke to Petersburg.

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1 Q. Thank you.

2 In paragraph 9 you state that "NSR's
3 handling of hazardous commodities shipments is
4 governed by a comprehensive scheme of federal
5 statutes and regulation."

6 Can you describe what you mean by
7 "comprehensive scheme of federal statutes and
8 regulations"?

9 A. This is a population of regulations
10 that describe and govern railroads for things
11 ranging from standards for track to standards for
12 rail car construction to standards for how
13 hazardous materials will be handled within a
14 railroad operation to reporting to the Federal
15 Government concerning certain aspects of hazardous
16 materials shipments.

17 I'm referencing a vast population of
18 regulations. I am just trying to describe in
19 general why the word "comprehensive" is used,
20 because it covers every possible step that
21 railroads use to transport hazardous materials
22 shipments.

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1 Q. What knowledge do you in your capacity
2 at NSR have of CSX's voluntary rerouting of
3 hazardous material traffic to their north-south
4 I-95 corridor since May of 2004?

5 A. To my knowledge, my knowledge is
6 related to what I have seen in press reports.

7 Q. And what is that knowledge?

8 A. That CSX has rerouted certain shipments
9 that they apparently normally would route up their
10 I-95 corridor route at the request of, I thought
11 it was, the Department of Homeland Security. And
12 I understood it was a temporary arrangement, but
13 beyond that I mean that's reaching back to my
14 knowledge from the press reports.

15 Q. To your knowledge does CSX still today
16 voluntarily reroute those materials?

17 A. I'm not aware of what they are doing
18 today.

19 Q. Do you know John Gibson, a vice
20 president over at CSX?
21 A. I have never met John Gibson, and I
22 only recently learned of his name.

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1 Q. And is that because of this case?
2 A. Yes.
3 Q. Have you read his affidavit submitted
4 in this case?
5 A. No, I have not.
6 Q. Have you spoken with any CSX official
7 about the subject matter of this case?
8 A. I spoke with -- let me just -- could
9 you repeat the question one more time.
10 Q. Sure.
11 Have you spoken with any CSX official
12 about the subject matter of this case?
13 A. Okay. I participated in part with a
14 call in which I understand John -- tell me the
15 name of the person again.
16 Q. John Gibson?
17 A. -- in which John Gibson, a person
18 identifying himself as John Gibson, was on the
19 call.
20 Q. And when was the call?
21 A. It was late yesterday afternoon.
22 Q. And did you have a conversation with

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1 Mr. Gibson?
2 MR. MOATES: I am going to interpose
3 here and say that CSX counsel and I spoke after
4 Mr. Gibson's deposition yesterday afternoon, and
5 at one point Mr. Osborne came on the line and
6 asked Mr. Gibson a question or two. But he did
7 not participate in most of that conversation.
8 MR. CASPARI: Sure.
9 BY MR. CASPARI:
10 Q. I am just interested in not what the
11 attorneys said, but what did Mr. Gibson say to
12 you?
13 A. I don't recall precisely, but the
14 subject matter had to do with the effect of
15 rerouting hazardous materials shipments, the cost
16 impact that that would have on customers.

17 Q. And was it your understanding that Mr.
18 Gibson had completed a deposition yesterday in
19 this matter?

20 A. Yes. That was my impression. I don't
21 have knowledge other than just that.

22 Q. And it is fair to say that Mr. Gibson

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1 was imparting to you some of the avenues of
2 approach that the District took in questioning
3 him?

4 MR. MOATES: Object. That's not what
5 he said. I think you should ask him what that
6 part of the conversation was.

7 BY MR. CASPARI:

8 Q. Did you understand the question?

9 A. Not entirely.

10 Q. For what purpose was Mr. Gibson to your
11 knowledge communicating the issue of the cost
12 impact on customers yesterday, late afternoon?

13 A. Well, the conversation, the point of
14 the conversation that I was involved in had to do
15 with the cost overall of what the D.C. ordinance
16 was likely to have; and I mentioned the cost to
17 customers as, if you will, part and parcel of the
18 cost to rail operations.

19 In other words, there is another
20 component of the cost, that is, the cost to the
21 shippers or the customers that move hazardous
22 materials shipments.

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1 Q. And what did you, if anything, say to
2 Mr. Gibson during the conversation or during this
3 call that you referenced?

4 A. I made a general statement about the
5 cost to customers which would involve the
6 necessity of having to purchase additional rail
7 cars, having to produce extra product, that is,
8 extra quantities, if you will, of hazardous
9 materials shipments in order to accommodate the
10 inefficiencies and the extra mileage and time that
11 would be involved in a reroute of these shipments
12 around municipalities that would ban these
13 routings through their jurisdiction.

14 Q. Correct me if I am wrong. It wasn't

15 limited to the cost of rerouting just around D.C.
16 Is that what you are telling us?
17 A. No, it is not --
18 Q. Let me restate. The conversation you
19 were having was not limited to the impact of
20 rerouting around D.C.?
21 A. My description had to do with the cost
22 to customers of having to reroute hazardous

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1 materials around municipalities, including D.C.
2 Q. And did you give a dollar figure on the
3 cost impact to the customers?
4 A. No, I did not.
5 Q. Have you prepared any cost impact
6 analysis regarding rerouting shipments around
7 municipalities?
8 A. No, I have not.
9 Q. Are you aware of any cost impact
10 analysis conducted by NSR in that regard?
11 A. No, I'm not.
12 Q. Are you aware of any cost impact
13 analysis regarding the rerouting of shipments just
14 around D.C.?
15 A. No, I'm not.
16 Q. In paragraph 10 you describe the
17 nation's rail system as "an interdependent
18 network."
19 Can you explain that a little bit?
20 A. The nation's railroads, meaning the
21 United States and necessarily it involves
22 railroads that operate in and out of Canada as

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1 well, have a number of points at which they
2 interchange traffic between themselves for the
3 movement of both loaded rail cars and empty rail
4 cars.
5 The fluidity of operations on each
6 railroad is essential to keeping the movement of
7 goods, trains, including through interchanges,
8 going. If one carrier has trouble, let's say, or
9 one carrier gets congested, there are noticeable
10 effects on the other carriers with whom they
11 interchange traffic.
12 Q. You state "Service disruptions on one

13 railroad's line can quickly affect operations on
14 the lines of other carriers as well."

15 What is a "service disruption"?

16 A. For example, this past year the
17 southeastern portion of the United States was
18 affected by a series of hurricanes. The effect of
19 those hurricanes was such that CSX, for instance,
20 had difficulty operating on their network that is
21 located in the southeastern part of the United
22 States.

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1 Because they had difficulty operating,
2 they could not accept traffic that we had for them
3 in interchange, and, in turn, they could not get
4 traffic that was for us in interchange that needed
5 to go back to or go to customers or receivers; and
6 as such in order for customers to keep
7 functioning, they need to come up with
8 alternatives.

9 That has the effect -- both
10 descriptions that I just gave you have the effect
11 or had the effect of causing signify congestion on
12 Norfolk Southern and that congestion situation
13 lasted for a good two to three months.

14 Q. To your knowledge how many miles of CSX
15 track was affected by the hurricane in Florida?

16 A. I don't know.

17 Q. To your knowledge what was the volume
18 of cars affected by the hurricane in Florida?

19 MR. MOATES: I think it is plural.
20 There were a lot of hurricanes.

21 BY MR. CASPARI:

22 Q. Well, let me clarify.

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1 A. Sure.

2 Q. Are you referring to a series of
3 hurricanes in Florida or are you referring to one
4 particular hurricane?

5 A. In the example that I cited, I was
6 referring to a series of hurricanes.

7 Q. And to your knowledge what was the
8 volume of the cars of CSX affected by those
9 hurricanes?

10 A. I don't know.

11 Q. Has there been any NSR after action
12 review, internal analysis of what happened in
13 Florida as a result of those hurricanes?

14 A. I'm not aware of such a thing.

15 Q. In paragraph 12 you reference "rail
16 service disruptions in the Houston area in 1997."

17 Can you explain that rail service
18 disruption?

19 A. Yes. Union Pacific had acquired the
20 property described as the Southern Pacific rail
21 system, and Union Pacific had a great deal of
22 difficulty integrating the operations of both

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1 railroads. And a significant portion of the
2 congestion that resulted from that difficulty
3 occurred in the greater Houston area, which
4 affects a number of chemical shippers.

5 Because of that disruption, the
6 connecting carriers that have handled traffic in
7 interchange with Union Pacific either had to hold
8 traffic back from Union Pacific, because Union
9 Pacific couldn't handle the traffic in
10 interchange, or the rail cars that those other
11 carriers needed for their customers were trapped
12 or stuck on Union Pacific, which in general terms
13 had a compounding effect in terms of congestion,
14 fluidity of operations.

15 Q. Why did you use this example in Houston
16 in your affidavit?

17 A. To use an example to point out that a
18 disruption on one carrier, because of the network
19 nature of the nation's rail system, has an effect
20 on all the other carriers with whom they
21 interchange.

22 Q. To your knowledge what was the volume

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1 of cars involved in the Houston scenario?

2 A. I don't know.

3 Q. Other than using an example of
4 interconnectedness or how problems can cascade to
5 other lines, do you draw any factual similarities
6 between Houston and what Norfolk Southern -- you
7 know, the rerouting over Norfolk Southern's lines?

8 MR. MOATES: Object to the form of the

9 question.
10 THE WITNESS: I'm not following.
11 BY MR. CASPARI:
12 Q. Sure.
13 Look at paragraph 18, please.
14 A. Okay.
15 Q. You state that in paragraph 18 you
16 "believe that NSR's lines would be the only
17 feasible alternative routing for most, if not all,
18 of this traffic." You see that in paragraph 18?
19 A. Yes.
20 Q. And which NSR lines are you referring
21 to?
22 A. In part, I would refer to the lines

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1 that I pointed out here on Exhibit 3, but, again,
2 it is a function of the specifics about the
3 traffic that would be rerouted. You had indicated
4 that this Exhibit 3 came from CSX. And if this
5 was the characteristic of the traffic in question,
6 this would be an example as I showed on Exhibit 3
7 of the diversion, what would have to happen to the
8 traffic.
9 Q. So for purposes of paragraph 18, you
10 are referring to these Norfolk Southern lines on
11 Osborne No. 3?
12 A. No. I don't want to be -- I don't want
13 to say that there is a direct application. I am
14 just saying that to the extent that we know about
15 the traffic, as inferred by this map that came
16 from CSX, it would seem to me that this map would
17 illustrate what the diversion would be, as I said
18 in 18.
19 But I qualified it by saying I don't
20 know the origin-destination points of the traffic
21 that is involved, so I can't speak authoritatively
22 that this would be the solution. It is likely

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1 that for the most part this would be a solution.
2 Q. And correct me if I am wrong, but it
3 may be part of the solution. There may be other
4 Norfolk Southern lines that would have to be used
5 to reroute. Is that your testimony?
6 A. It could be, yes.

7 Q. So we are not dealing with these lines
8 exclusively?

9 A. Again, absent knowledge about the
10 specifics of the traffic, but in general, yes.

11 Q. I think I understand.

12 To your knowledge how many cars are
13 currently being rerouted under the voluntary
14 reroute plan by CSX around D.C.?

15 A. I have no knowledge of that.

16 Q. Correct me if I am wrong. Then having
17 no knowledge of that, you are not contending in
18 this affidavit that a service disruption would, in
19 fact, occur if CSX was allowed to reroute using
20 Norfolk Southern's lines?

21 A. Could you say that question again.

22 Q. Sure.

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1 You told me you are not aware of the
2 amount of cars that CSX is voluntarily rerouting.

3 A. That's correct.

4 Q. Are you aware of the volume of cars
5 that CSX would have to reroute if the D.C.
6 ordinance was enforced?

7 A. I do not know the specific volume or
8 number of loads and empties,
9 loaded rail cars and empty rail cars, that would
10 have to be rerouted if this ordinance was
11 enforced.

12 Q. Having said that, I don't glean from
13 your affidavit that you are stating that a service
14 disruption would, in fact, occur if the cars were
15 rerouted over Norfolk Southern's lines. Is that a
16 fair statement?

17 A. What I am saying in my affidavit is
18 that by forcing CSX to reroute traffic as
19 described in the D.C. ordinance, the likelihood of
20 congestion, problems with fluidity, the reference
21 I made earlier in section 10 of my affidavit,
22 would increase appreciably.

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1 Q. The likelihood?

2 A. Yes.

3 Q. Have you done any computer modeling or
4 analysis to determine what the impact would be on

5 NSR operations if CSX rerouted those materials on
6 NS lines?

7 A. No, I haven't. Not that I am aware of.

8 Q. My question was you personally. You
9 didn't conduct any computer analysis?

10 A. No, I did not.

11 Q. Are you aware of any computer analysis
12 conducted by NSR in that regard?

13 A. No, I'm not.

14 Q. In order to conduct a computer analysis
15 on -- let me ask this.

16 Have you ever conducted a computer
17 model analysis regarding the flow of traffic over
18 NSR's rail lines?

19 A. Not that I am aware of.

20 Q. Do you know who in NSR would be
21 responsible for conducting such computer analysis?

22 A. If something like that were to be done,

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1 it would be conducted by our network operations
2 group based in Atlanta.

3 Q. In terms of your affidavit you said the
4 likelihood would increase. Do you have a
5 percentage of the likelihood of service
6 disruption?

7 A. No, I don't.

8 MR. CASPARI: If I can take a
9 five-minute break.

10 (Recess.)

11 MR. CASPARI: Back on the record.

12 BY MR. CASPARI:

13 Q. Mr. Osborne, I was asking you questions
14 about the likelihood of service disruptions in the
15 event of a CSX reroute.

16 In order to conduct an analysis of the
17 likelihood of service disruptions, what type of
18 factors does NSR need in order to evaluate that?

19 A. First, you know, we would start -- we
20 would likely start by looking at our experience.
21 For instance, I cited the example of the effect of
22 the hurricanes that happened this past year in the

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1 southeast portion of the United States. I also
2 made reference in my affidavit to the service

3 disruptions that happened with the UP-SP merger.
4 That forms of the foundation for why we believe
5 there is likely to be service disruptions.

6 Then moving into details, we would in
7 general kind of look at a couple of things. I am
8 speaking for Norfolk Southern. We would need to
9 see what traffic was affected. We would need to
10 know the effect that this would have on CSX,
11 because the effect on their operation affects our
12 operation.

13 We would also need to know from that
14 analysis if there were also effects on other
15 carriers beside Norfolk Southern and CSX. And we
16 would also have to take into consideration the
17 effect that this event, that is, the actions by
18 Washington, D.C., would have in terms of other
19 municipalities taking like, similar actions, some
20 of which we are becoming aware of as we speak.

21 So I don't want to characterize this as
22 an all inclusive type of analysis. It is more of

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1 an analysis that says we know what happens when
2 there are disruptions. We know generally what
3 causes the disruptions, and given the potential
4 snowball effect that would accompany the D.C.
5 actions, we can project how this would harm
6 Norfolk Southern, harm our customers, and affect
7 the fluidity, the ability of the North America
8 rail network to continue functioning.

9 Q. If you don't know the number of cars
10 affected, number of CSX cars affected, how can you
11 evaluate the impact on Norfolk Southern's rails?

12 A. I can evaluate it because I am aware
13 that in general -- this is publicly available
14 information -- CSX handles a larger volume of
15 chemical or hazardous materials type shipments
16 than Norfolk Southern.

17 I also know that this corridor that is
18 affected by the D.C. ordinance is one of CSX's
19 main corridors. I don't know specifically what
20 moves -- I'm sorry -- what chemical or hazardous
21 materials shipments move in those corridors, but I
22 made an assumption, and that is why I said what I

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1 said in this affidavit, that it is a significant
2 number, and that has the effect of presenting the
3 likelihood of service disruptions and congestion
4 that is involved.

5 Q. The service disruptions that you speak
6 of, it is not guaranteed that service disruptions
7 will occur. Is that a fair statement?

8 A. I would answer it this way. There are
9 other variables that are embedded in this that
10 move the conclusion closer to a guarantee than
11 not. And one of the biggest variables is the
12 effect of other municipalities adopting the same
13 kinds or, I'm sorry, the general thrust of the
14 D.C. ordinance that we are here for today.

15 Q. You mentioned harm to customers. How
16 is that quantified or evaluated?

17 A. When customers make arrangements for
18 rail transportation in the chemical or the
19 hazardous material world, those customers own not
20 only the product that is in the rail car, but they
21 either own or lease the rail cars. When they make
22 their decision about routing traffic over a rail

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1 line, they use information from the railroads as
2 to what we refer to as the cycle time for the car;
3 that is, to use just an example, that in this
4 origin-destination pair the time it takes for the
5 car to be loaded at origin, shipped to
6 destination, unloaded and returned back to origin,
7 to use a simple example, let's say would be 30
8 days.

9 In the world we are talking about, that
10 I am describing that forms of the basis of what I
11 said in the affidavit, the additional time that is
12 inherent in just the description that we talked
13 about in Exhibit 3, plus the unknown but likely
14 result because of congestion, is going to add to
15 the cycle time for the rail cars.

16 So, to use an example, let's say it
17 doubles. So instead of 30 days it takes 60 days.
18 Well, in order to fill that pipeline of product,
19 in order for the customer to continue meeting
20 their customers' needs, they would likely have to
21 double the number of rail cars that they own in
22 order to support this move. Plus they have to

1 produce extra product, like, for instance,
2 chlorine, they have to produce at least double the
3 amount of chlorine and have it in the pipeline in
4 order to make sure that the chlorine arrives when
5 their customers need it.

6 All of that adds time that rail cars,
7 these types of rail cars would be on our lines or
8 the lines of the affected carriers.

9 Q. Have you done any analysis as to the
10 increase in cycle time for CSX or Norfolk
11 Southern's customers as a result of the rerouting?

12 A. To my knowledge, no.

13 Q. So other than the knowledge of service
14 disruptions from Houston, hurricanes -- strike
15 that.

16 Hurricanes, that's a pretty
17 catastrophic event in Florida.

18 A. It is a catastrophic, but temporary
19 event.

20 Q. What I want to ask you and have you
21 identify is what specific data do you have
22 regarding CSX's operations near D.C. that you

1 considered in drawing the conclusion of service
2 disruptions as a result of the rerouting.

3 A. The only information I have is what I
4 described previously in the long answer I just
5 gave you.

6 Q. Well, the only data that I thought I
7 understood you to say, and correct me if I am
8 wrong, please, is the two scenarios, Houston and
9 Florida, and general knowledge regarding service
10 disruptions on one line and how it cascades onto
11 other lines.

12 I did not hear any specific CSX data or
13 numbers within your analysis. Please correct me
14 if I am wrong.

15 A. You are right, I did not use a specific
16 number. But to repeat what I said earlier, I am
17 aware -- and again this is knowledge that is
18 publicly available -- that CSX is a larger
19 shipper, CSX handles more volume of chemical
20 hazardous material type commodities than Norfolk

21 Southern.

22 I also said that this corridor, the

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1 I-95 corridor shown here on Exhibit 3, is one of
2 their main corridors. And using logic, it would
3 seem to me that a significant number, since they
4 are a large hauler of chemical and hazardous
5 material shipments, A, and B, this is one of their
6 main corridors, that there is likely to be a fair
7 amount of volume that is covered by the D.C.
8 ordinance that would be affected. And as such, I
9 am saying that the likelihood of a disruption,
10 plus what I described, the effect on your
11 customers, would occur.

12 Then I added to it the unknown, which
13 is, let's say, other municipalities that are
14 assumed to be affected by this D.C. ordinance pass
15 a similar ordinance. Then you have a snowball
16 effect that supports the position that I am
17 describing here in my affidavit.

18 But to answer it the other way, I do
19 not have specific knowledge about the specific
20 volume of traffic that CSX handles through -- the
21 volume that is affected by this ordinance.

22 Q. You use the term "significant number."

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1 It is your understanding.

2 Can you quantify that in any way?

3 A. At this moment, I can't quantify it. I
4 just believe that it is larger than the number
5 that I cited in my item 7 of my affidavit, simply
6 because CSX historically has handled a larger, a
7 significantly larger volume of this type of
8 traffic than Norfolk Southern.

9 Q. And just to clarify, in paragraph 7 you
10 are referring to all of NSR's hazardous materials
11 transportation in 2004?

12 A. What it refers to is 366,000 shipments
13 of hazardous materials that we described as
14 loaded.

15 Q. Loaded?

16 A. Loaded.

17 Q. Not empties that may still be placarded?

18 A. In the world of hazardous materials

19 shipments, for regulatory and safety reasons, we
20 assume that the empty still has some material left
21 in it; and we treat it as if it does have material
22 left in it. So this is just the loaded side of

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1 the data included here in item 7.

2 Q. Back to what you said before that, you
3 are assuming what in regard to CSX's shipments of
4 hazardous material in relation to this number?

5 A. I am just saying that their number --
6 if their number was present here today, it would
7 likely be much larger than this number.

8 Q. And to compare apples and apples, CSX's
9 total shipments, not just referring to D.C., would
10 be much larger than this?

11 A. For clarification purposes, yes. I am
12 talking about their total shipments and comparing
13 it with our total shipments that we are showing
14 here.

15 Q. In stating in your affidavit, did you
16 just include those shipments of CSX, shipments of
17 hazardous materials, that would have to be
18 rerouted as a result of the D.C. ordinance?

19 A. I need you to rephrase.

20 Q. Sure.

21 I want to clarify if you think that CSX
22 transports more than 366,000 shipments of

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1 hazardous materials through D.C. I am pretty sure
2 your answer is no, that's not what your testimony
3 was.

4 A. To repeat, in item 7, I am referring to
5 the total number of such shipments on Norfolk
6 Southern, hazardous materials shipments on Norfolk
7 Southern. The total shipments on CSX in calendar
8 year 2004, I believe, is substantially larger on
9 their whole system than the 366,000 that is listed
10 here.

11 Q. And I have asked you in terms -- I
12 understand you don't know the exact number that
13 CSX transports through the District. You said it
14 is a significant number. As a lay person, I have
15 no idea what is a significant number according to
16 a railroad.

17 Are you referring to 100,000 shipments
18 through D.C. as a significant number? Are you
19 referring to 5,000 shipments through D.C. In a
20 calendar year as a significant number? Can you
21 provide us some sort of left and right limit as to
22 your understanding of CSX's shipments of hazardous

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1 material through the District?
2 A. Can I provide -- say that last part
3 again.
4 Q. A left and right limit.
5 A. I see.
6 Q. Some sort -- because I do not know what
7 you mean by a significant number. It could be
8 anything.
9 A. Okay. Again, I don't have knowledge
10 about what the shipments would be. I was pointing
11 to another relevant fact here, that this is one of
12 their significant corridors. They have a number
13 of corridors, just like we do, and actually just
14 like all railroads do. And the volume of traffic
15 that moves over these corridors is much higher
16 than would move elsewhere in a railroad's system.
17 So I am drawing the conclusion that
18 there is probably a significant volume of this
19 traffic that moves because this is a corridor
20 route for CSX.
21 As far as a substantial number, I
22 wouldn't be surprised if we are talking 40 to

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1 50,000 loads a year. I don't know. But I
2 wouldn't be surprised if that was the number.
3 Q. Loads of what, please?
4 A. Of chemical/hazardous material
5 shipments.
6 Q. And is that what you have in mind when
7 you are making the assertions in the affidavit
8 that the rerouting of possibly that number of cars
9 would cause a service disruption on Norfolk
10 Southern?
11 A. That, coupled with the effect of other
12 municipalities adopting the same position that
13 Washington, D.C. -- that the District has adopted.
14 Q. How is NSR compensated for the use of

15 its rails by other railroad companies under
16 trackage rights agreements?

17 A. Just so I am clear, when another
18 railroad operates on Norfolk Southern?

19 Q. That's correct.

20 A. Within the trackage rights agreement
21 that is signed between the two parties, included
22 in there is a reference to how the party providing

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1 the trackage rights will be compensated.

2 Q. And are you familiar with how the
3 compensation is determined? By miles? How do
4 they fashion the compensation to NSR when another
5 rail company uses its lines?

6 A. I don't recall. I know of one
7 agreement in which it is on a per mile basis. But
8 I know that it is under other bases. It depends
9 upon the particulars of the agreement.

10 Q. NSR is compensated for allowing the use
11 of its tracks by other railroad companies pursuant
12 to trackage rights agreements?

13 A. I believe the answer is likely yes.

14 Q. Is that not a business decision of NSR,
15 to enter into trackage rights agreements?

16 A. Yes, it is.

17 Q. Are you aware of any Federal or
18 regulatory requirement that compels NSR to enter
19 into trackage rights agreements?

20 A. Not that I am aware of.

21 MR. MOATES: Can I consult with him on
22 one thing.

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1 (Witness and counsel conferring.)

2 BY MR. CASPARI:

3 Q. Do you need to clarify something, sir?

4 A. Yes. I am also aware that the STB has
5 the authority to direct trackage rights.

6 Q. It is your understanding the STB could
7 compel NSR to enter into a trackage rights
8 agreement with another railroad?

9 A. I believe that's within their authority
10 to do so.

11 Q. Is that on a permanent basis or just
12 emergency purposes?

13 A. I'm not exactly sure, but I believe it
14 is both.

15 Q. Who decides -- you may have answered
16 this already. Who negotiates on behalf of NSR for
17 trackage rights agreements and the compensation to
18 be paid by other companies?

19 A. It depends upon what the purpose of the
20 trackage rights agreement is. They are usually
21 for commercial, business reasons. So whatever the
22 business group involved, it would be involved in

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1 the negotiation. Our transportation department
2 would be involved. Our law department would be
3 involved. And that group I mentioned earlier,
4 joint facilities would be involved. I think I
5 have covered most, if not all, of the bases there.

6 Q. Who has the final say, yea or nay, on
7 entering into a trackage rights agreement on
8 behalf of NSR?

9 A. That's a senior management decision.

10 Q. Does that include you?

11 A. No.

12 Q. And when you refer to "senior
13 management," is there a certain level, CEO, CFO?
14 Whom are you referring to?

15 A. I am referring to our senior vice
16 president and above level. I'm not familiar with
17 the specifics. I believe it varies slightly
18 depending upon, you know, the issue at hand; but
19 both our commercial and operations senior vice
20 presidents need to approve such things.

21 Q. Did you speak with any of the senior
22 management regarding the substance of your

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1 affidavit, other than Mr. Lawson?

2 A. I spoke with -- your question had to do
3 with the substance of the affidavit? Was that
4 what you said?

5 Q. What is contained in your affidavit.

6 A. Mr. Lawson's boss or supervisor is Don
7 Seale, and I have spoken with Don Seale concerning
8 some of the subjects that are covered in this
9 affidavit.

10 Q. Is Mr. Seale familiar with the contents

11 of your affidavit to your knowledge?
12 A. I'm not sure. I'm not sure.
13 Q. Did Mr. Seale give you the authority to
14 speak on behalf of NSR for purposes of executing
15 this affidavit?
16 A. Yes, he did.
17 Q. What did Mr. Seale say to you regarding
18 your involvement with this affidavit?
19 A. As I recall, we talked about the effect
20 on our operations of this ordinance. That
21 inherent in that effect we would incur a
22 significantly higher level of risk that concerned

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1 us, and that it was likely that other
2 municipalities through which we would operate in
3 in adopting similar ordinances would have a
4 magnifying effect, negative effect on our
5 operations.
6 Q. Okay, you have identified two things.
7 Incur significant level of risk and the impact of
8 other municipalities passing similar measures. Is
9 that a fair statement?
10 A. Among others. Well, I talked about
11 congestion. That is the effect on our
12 operations. That's the congestion issue.
13 Q. Any other concerns?
14 A. I left out one. I also discussed this
15 thing I described earlier about the effect on our
16 customers.
17 Q. The effect on NSR's operations as a
18 result of the D.C. ordinance, is that what you
19 have referenced in your affidavit, the potential
20 service disruptions?
21 A. Without reading through the affidavit
22 again, that's what -- as I just answered, that's

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1 what I am talking about.
2 Q. Can you explain how you would incur a
3 significantly higher level of risk? Can you
4 explain that, please?
5 A. Okay. Depending upon the volume of
6 traffic that would have to be rerouted, both as a
7 result of the ordinance at question as well as
8 other municipalities, you inherently add more time

9 that these cars, these chemical, hazardous
10 materials cars would be on our railroad. It would
11 add to the number of handlings, the number of
12 times that you have to -- when a car arrives at a
13 classification yard, it gets uncoupled and
14 resorted, depending on where it is going to go,
15 and then it is put back together. That has a
16 higher element of risk.
17 The concern then goes to the fact that
18 there are now more employees and more citizens
19 that are near our right of way or near where we
20 conduct our operations who are going to be exposed
21 to higher levels or higher potential incidents for
22 the shipment of chemical and hazardous materials.

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1 And that is our largest concern. That
2 is the concern of Norfolk Southern.
3 Right underneath of that is this issue
4 of congestion, because as you can understand, more
5 time, more circuitous routing, more handlings, the
6 effect on other carriers because of the changes or
7 the unintended changes in their operating plans
8 that they have to make in response to these type
9 of ordinances all contribute to what I said
10 earlier, the high likelihood of problems with
11 service, fluidity, congestion.
12 Q. At the time you executed that
13 affidavit, what other municipalities were you
14 aware of that were considering similar measures to
15 the D.C. ordinance?
16 A. I had heard of Pittsburgh, the City of
17 Pittsburgh, Pennsylvania. I had heard comments
18 being made by the City of Baltimore, Maryland. I
19 have seen heard of comments made by the City of
20 Philadelphia and I'm reaching back here, but I
21 know that there was some comments made in a
22 magazine that is common in the railroad industry

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1 called Traffic World that talked about not only
2 the actions by D.C., but also the interest by at
3 least some members of the District to encourage
4 this among other municipalities.
5 Q. Are you aware of whether any of those
6 other municipalities have introduced an ordinance

7 similar to D.C.?

8 A. As to the specifics, I am not aware. I
9 am just aware of the general intent and thrust of
10 what they are trying to do.

11 Q. Are you aware of any internal NSR
12 studies or external studies that evaluate --
13 strike that.

14 Are you aware of any studies that
15 identify or correlate increased dwell time in rail
16 yards to increased probability of nonaccidental
17 releases of hazardous materials?

18 A. I am not aware of specific studies. I
19 am aware that as a result of risk analysis that we
20 have looked at what is the safer way and,
21 therefore, the lower risk way of handling
22 commodities like this. And in general the

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1 conclusion is to reduce handlings and to route
2 traffic by the most efficient service route.

3 Q. The risk analysis is in terms of
4 accidental release. Is that a fair statement?

5 A. I'm not sure what you mean by
6 "accidental release."

7 Q. Accidents versus intentional acts of
8 criminals or terrorists.

9 A. Well, aside from criminal type things,
10 criminal type events that I believe we can agree
11 we understand, this included analysis of releases
12 of hazardous materials and the analysis led to
13 certain conclusions about what is a lower risk
14 method of handling commodities than ways that had
15 been done before, and tried to make changes that
16 have the effect of reducing those levels of
17 risk.

18 Included in there is, again, less
19 handlings, more direct, more efficient routings,
20 less time sitting at various locations on a rail
21 line.

22 Q. Just so I understand your testimony, it

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1 is your testimony that this risk analysis was
2 conducted by NSR?

3 A. Among others. I say this is by NSR.
4 The rail industry is quite active in trying to

5 find ways to reduce risk, and there are a number
6 of programs that are done to do that. So this
7 isn't just one type of analysis. This is an
8 ongoing type of study effort to find ways to
9 reduce risk.

10 Q. And what I am interested in is if you
11 have a particular study or analysis that you can
12 identify that identifies increased dwell time with
13 the increased risk of a terrorist or criminal act.

14 A. I am not personally aware of such a
15 study. I just know that in the course of this
16 business that I am in that this is a commonly
17 understood approach, that is driven upon studies
18 that have been done to try to affect or try to
19 reduce the level of risk.

20 Q. Are you aware of any studies that
21 equate increased car mileage, increased routed
22 mileage with an increased risk of a terrorist

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1 attack?

2 A. Could you say the question once again.

3 Q. Are you aware of a risk analysis study,
4 report, that equates an increase in car miles or
5 route miles, however it is identified in the
6 railroad industry, with an increased risk of
7 terrorist attack on a hazardous material car?

8 A. I am not personally aware of such a
9 study.

10 Q. Are you aware of any study that
11 correlates an increased number of handlings with
12 an increased risk of a terrorist attack on a
13 hazardous material car?

14 A. I am not personally aware of any such
15 study.

16 Q. Paragraph 14, substantial volume -- in
17 paragraph 15 you indicate "1.5 million loaded and
18 empty rail cars" -- strike that.

19 Does Norfolk Southern transport
20 hazardous materials over this route, either the
21 one that was identified or the one you have
22 identified with the blue pen in Osborne 3?

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1 A. To my knowledge Norfolk Southern does
2 handle hazardous materials over -- chemical

3 shipments over this route.
4 Q. And do those shipments include chlorine
5 and liquid propane gas?
6 A. I believe the answer is yes. Yes.
7 Q. Are you aware of the number of
8 shipments I just referred to for, say, calendar
9 year 2004?
10 A. No, I am not. I am not aware
11 specifically here.
12 Q. Do you know how NSR would compile that
13 data?
14 A. Yes, I do.
15 Q. How would they?
16 A. It would be a combination of my
17 chemicals group, plus our operations support
18 group, running an analysis through using our
19 database to find out what hazardous materials of
20 what type and what volume moved over this
21 particular corridor.
22 Q. To your knowledge has that data been

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1 compiled for purposes of this case or your
2 affidavit?
3 A. To my knowledge, no.
4 Q. For that portion of NSR rails that
5 other companies such as CSX has trackage rights
6 to, how was NSR apprised of what commodities those
7 other companies are shipping over NSR's rails?
8 A. I'm not sure. That is, I am not sure
9 how NS knows. I just know that NS is required by
10 law to know what is in the train consist that
11 another carrier would use using trackage rights.
12 Q. What, if any, limitations are placed on
13 the company receiving trackage rights in terms of
14 what commodities it could transport over NSR's
15 rails?
16 A. It depends upon the purposes and the
17 details of the specific trackage rights agreement.
18 Q. Does CSX have trackage rights over this
19 portion of Norfolk Southern's rail identified in
20 Osborne 3?
21 A. To my knowledge, no.
22 Q. Does any other rail company have

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1 trackage rights over that portion of NSR's rails?
2 A. To my knowledge, no.
3 Q. How many trackage rights agreements are
4 there between NSR and CSX?
5 A. I do not know.
6 Q. In paragraph 18 we have addressed this
7 a little bit. The "feasible alternative routing"
8 that is mentioned in the third line there, and
9 correct me if I am wrong, I believe you
10 established before that you are not exclusively
11 referring to what is identified as Norfolk
12 Southern's rails in Osborne 3 in paragraph 18.
13 A. Yes, I said earlier that without
14 knowing the details I wouldn't be sure.
15 Q. Can you identify any service
16 disruptions on Norfolk Southern's rails,
17 particularly as identified in Osborne 3, in May of
18 2004 as a result of the CSX's voluntary rerouting?
19 A. Voluntary?
20 Q. Rerouting.
21 A. Let me ask you to repeat the question.
22 Q. Sure.

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1 I forget what your answer was, whether
2 you knew CSX was voluntarily rerouting starting
3 May of 2004.
4 A. Yes.
5 Q. Were you aware of that?
6 A. Yes, I had said earlier that I was
7 aware through press reports that CSX had done some
8 voluntary rerouting, I believe in conjunction with
9 the discussion with the Department of Homeland
10 Security, around Washington, D.C. as a temporary
11 measure. I think, without citing the specific
12 press reports, that's what I understood.
13 Q. And you are not aware of whether they
14 are still continuing to voluntarily reroute or
15 not?
16 A. Right, I am not aware.
17 Q. My question is, when they first began
18 to voluntarily reroute, can you identify any
19 service disruptions to Norfolk Southern's rails?
20 A. None that I am aware of. But, of
21 course, I don't know what CSX did.
22 Q. But you are not aware as group vice

1 president for chemicals in May 2004 -- did you
2 hold that position in May 2004?

3 A. Yes, I did.

4 Q. You were not aware in May of 2004 of
5 any service disruptions as a result of CSX's
6 voluntary rerouting?

7 A. That's correct.

8 Q. Mr. Osborne, number 14, please, if I
9 could ask you a couple more questions about that.

10 Where is this traffic that you
11 reference in paragraph 14 interchanged with CSX?
12 If that's a dumb question, feel free to tell me.

13 A. I don't believe it is a dumb question.
14 It is that I know we have a large number of
15 interchange points with CSX. I don't know how
16 many. But it is a large number.

17 Q. Is it fair to say over 100 interchange
18 points?

19 A. That may be true. But, you know, I can
20 use examples of points at which we interchange
21 traffic with CSX. As I say in 14, "substantial
22 volume" is interchanged with railroads, including

1 CSX.

2 Q. In paragraph 15, you do quantify
3 "approximately 1.5 million loaded and empty rail
4 cars" were received in 2004. Would you
5 characterize "1.5 million cars loaded and empty"
6 interchanged as a substantial volume?

7 A. That I would characterize as a very
8 large number.

9 Q. Does Norfolk Southern interchange --
10 strike that.

11 Does CSXT interchange hazardous
12 materials with Norfolk Southern either at
13 Petersburg, Virginia or Philadelphia,
14 Pennsylvania?

15 A. Yes.

16 Q. It is fair to say that Norfolk Southern
17 transports on this route identified in Osborne 3
18 hazardous material cargo originated by CSX?

19 A. That I don't know.

20 Q. And when you answered yes previously,

21 can you explain how it could be yes for the
22 previous question, but you are not sure about that

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1 one?

2 A. Sure. You said hazardous materials
3 either at Petersburg or at Philadelphia. We
4 interchange hazardous material traffic with CSX at
5 Philadelphia. And I'm citing an example that I am
6 aware of. But that traffic goes to a point that
7 is well north of Philadelphia.

8 Q. When you interchange, is it going from
9 Norfolk Southern to CSX or vice-versa?

10 A. It is going from Norfolk Southern to
11 CSX.

12 Then your second question was, would it
13 use the route that I drew on Exhibit 3 that
14 originated on CSX. And I'm not sure that there is
15 any. I don't know, but I am not sure.

16 Q. Your Philadelphia example, the route
17 that you are referring to, it goes to a point
18 north, is that correct?

19 A. Yes.

20 Q. Did it travel this route in reaching
21 Philadelphia as identified in Osborne 3?

22 A. No. It originates in the greater

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1 Philadelphia area. You see, to explain, it
2 wouldn't make sense for CSX to originate something
3 and give it to NS if it is going up to a point
4 further up on CSX's network. That's why I am not
5 sure, but I am doubtful that hazardous materials
6 that originate on CSX would move on this route
7 that you describe in Exhibit 3.

8 Q. The hazardous material traffic that
9 does travel on this route in Osborne 3, is it
10 originated by Norfolk Southern?

11 A. Some is. Some is not.

12 Q. And what's your basis for that?

13 A. Most of Norfolk Southern's
14 chemical/hazardous material type traffic is
15 received traffic. We will receive it from another
16 carrier. And most of our business is interline.
17 In other words, there is more than one carrier
18 involved.

19 So a typical example of traffic that
20 moves on this corridor as I described it in
21 Osborne 3 would be traffic that originates from
22 points along the Gulf Coast, Gulf of Mexico, that

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1 is, Texas, Louisiana, that we receive in
2 interchange from other carriers.
3 Q. And that involves interchange of
4 hazardous materials from other carriers?
5 A. Oh, yes.
6 Q. In paragraph 15, what percentage of
7 interchange traffic is the 1.5 million
8 interchanged with CSXT during 2004?
9 A. I'm not sure.
10 Q. Is CSXT your largest interchange
11 carrier?
12 A. It is one of the largest ones. Union
13 Pacific, Burlington Northern-Santa Fe, and CN are
14 other large interchange carriers that we do
15 business with.
16 Q. What percentage of NSR's total rail
17 traffic is ultimately interchanged?
18 A. I don't know exactly what that is.
19 Q. Did my question make sense or you just
20 don't know the answer?
21 A. Your question made sense. I don't know
22 the answer.

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1 Q. Have you or are you aware of any fiscal
2 analysis conducted by NSR regarding how much
3 revenue could be generated from granting CSX
4 trackage rights over this route identified in
5 Osborne 3?
6 A. I am not aware of any such fiscal
7 analysis.
8 Q. In paragraph 19, you state "NSR would
9 not consent to any proposal to divert large
10 volumes of CSXT's hazardous materials traffic to
11 NSR's lines."
12 Again, can you somehow quantify what
13 you mean by "large volumes"?
14 A. For the population of traffic that we
15 are talking about, the hazardous materials
16 traffic, you know, I can't give you a specific

17 number. But if you look in the context of what we
18 do today, the volumes we ship today and
19 interchange today, if there was a significant
20 change in that number, we would have an objection
21 and for the reasons that I stated earlier: the
22 risk components, that is, the extra time spent on

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1 the railroad, the extra handlings, the likelihood,
2 probability that other municipalities are going to
3 do the same thing which makes the complicating
4 factor, it magnifies the complicating factor.

5 So let me give you an order of
6 magnitude. So if this was simply an isolated
7 event, I don't see an issue with, say, 50 to 100
8 cars a year, something like this. But it is not
9 an isolated event because there are other
10 magnifying effects that go on.

11 Q. Are you aware of the increase in NSR
12 traffic over what is identified now in Osborne 3
13 from, say, year 2003 to year 2004?

14 A. No, I'm not.

15 Q. Is it your understanding that traffic
16 over NSR's rail identified in Osborne 3 from 2003
17 to 2004 increased?

18 A. I'm not aware of that either. You are
19 referring to hazardous materials shipments or
20 talking about all volume?

21 Q. All volume.

22 A. I'm not aware.

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1 Q. And just so the record is clear, is
2 your answer any different when we just look at
3 hazardous materials cars?

4 A. No, it is the same answer. I'm not
5 aware.

6 Q. Are you aware whether across all of
7 NSR's rail network -- let me ask you this.

8 How is it measured? Is it car, total
9 car transports across NSR's rail network? Is
10 there a term used by the industry, total amount of
11 cars transported across NSR's rail network?

12 A. I'm not exactly --

13 Q. Number of cars?

14 A. We refer to it as carloads.

15 Q. Carloads?
16 A. Right.
17 Q. Are you aware whether from 2003 to 2004
18 NSR's carloads increased?
19 A. Over this?
20 Q. Over NSR's entire rail network.
21 A. Yes. Norfolk Southern, there were more
22 cars handled by Norfolk Southern in 2004 than in

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1 2003.
2 Q. You say "handled." Is that the same
3 thing as carloads?
4 A. Carloads or shipments handled by
5 Norfolk Southern.
6 Q. And what percentage or what number of
7 increase was that between 2003 and 2004?
8 A. I'm not sure. I know it was higher. I
9 am just not sure what it was.
10 Q. And where did you obtain that data?
11 A. When we looked at our 2004 results.
12 These are known for the company. I just don't
13 recall what that was for the carloads.
14 Q. You state in paragraph 19 -- you say
15 "because such action would only transfer the risk
16 inherent in the movement of those shipments from
17 the District to the communities through which NSR
18 operates."
19 Can you explain that?
20 A. Sure. I will explain it by example.
21 If you look at Exhibit 3, and you imagine
22 hazardous materials shipments moving between

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1 Petersburg and Philadelphia on what is identified
2 as CSX's routing, and transferred those movements
3 to a routing that is described on Exhibit 3 as
4 that over Norfolk Southern as I described, there
5 are more communities, more rail miles, more rail
6 yards, that are exposed to the risk of these
7 commodities than are exposed by the routing that
8 apparently exists today for this
9 Petersburg-Philadelphia routing.
10 That means more employees, more
11 citizens, more opportunities for something to go
12 wrong occurs as a result of rerouting.

13 And then I also have to add that other
14 comment I made about the magnifying effect. Let's
15 say the City of Hagerstown, Maryland or
16 Harrisburg, Pennsylvania decides to adopt the same
17 ordinance as was adopted in Washington, D.C. Then
18 you are talking about a whole different set of
19 routings that further increase the population of
20 employees, citizens that are exposed to this, plus
21 the associated car miles and handlings and the
22 effect on the rail operations that I described.

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1 Q. In signing this affidavit, are you
2 assuming interchange of traffic or CSX operating
3 pursuant to trackage rights agreements?

4 A. I am assuming either/or. It makes no
5 difference in terms of the thrust of my statement
6 in 19.

7 Q. The risk inherent in the movement, is
8 that not -- aren't you referring to your data on
9 accidents and not risk associated with a terrorist
10 attack?

11 A. I'm assuming the risk associated with
12 normal rail operations. There is still a risk
13 that accidents do occur on the railroad, in rail
14 operations, that are taken into account when we
15 talk about this term of risk as I describe in 19.

16 Q. In paragraph 19, there is no data that
17 you are aware of that states there is an increased
18 risk of a terrorist attack with the increased car
19 miles?

20 A. If you are referring to a terrorist
21 attack, I'm not aware of something related to
22 that.

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1 Q. And that's why I just want to clarify
2 that the risk inherent in the movement are the
3 risks commonly associated with rail traffic such
4 as safety, accidental releases at rail yards and
5 handlings and things of that nature and not
6 terrorist acts. Is that a fair statement?

7 A. Again, I'm not aware of any analysis
8 that took into account terrorist actions. I am
9 just saying we are on an ongoing basis continually
10 looking for ways to reduce the risks associated

11 with handling hazardous materials. And we know
12 from experience that, as I described before, the
13 most efficient route, fewer handlings, fewer time
14 on the railroad has an effect in terms of reducing
15 the risk to our employees and to the people that
16 live near our right of way.

17 Q. I believe earlier you stated that you
18 do not have the authority to enter into trackage
19 rights agreements on behalf of NSR. Is that a
20 fair statement?

21 A. I do not have such authority.

22 Q. Who at NSR authorized you to state on

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1 behalf of the company that "NSR would not consent
2 to any proposal to divert large volumes" of the
3 hazardous materials to your lines?

4 A. Well, in addition to myself, my
5 supervisor, David Lawson, his supervisor, Don
6 Seale, and I believe our operations group which is
7 headed up by a gentleman named Mark Manion, our
8 law department which is headed up by Jim Squires.
9 And there may have been other individuals that I
10 am not aware of.

11 But, again, as I said earlier, this is
12 a position of the senior management of Norfolk
13 Southern after looking at all the risk factors
14 that I described earlier in this deposition.

15 Q. The risk factors you looked at, but you
16 didn't have CSX's data regarding number of cars
17 involved in any potential reroute?

18 A. That is correct.

19 Q. Are you aware of any communications
20 between NSR and CSX regarding the use of NSR rails
21 as alternative routes as a result of the D.C.
22 ordinance?

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1 A. Not that I am aware of.

2 Q. Other than this affidavit, are you
3 aware of any other statement by NSR that indicates
4 NSR will not consent to any proposal to divert
5 large volumes across NSR lines?

6 A. I believe there is something in our --
7 I don't know -- the amicus brief, I mean a filing
8 that was made.

9 Q. STB?

10 A. I don't recall whether it was that or
11 the District Court. But if that's what you mean
12 by a statement, there is something besides this
13 affidavit that talks about our position as I cover
14 in my item number 19.

15 Q. Other than any court filings or filings
16 with the STB, have there been any public official
17 statements of the NSR regarding that particular
18 subject?

19 A. Not that I am aware of.

20 Q. Other than the factors identified in
21 19, the risk inherent, shifting the risk inherent
22 from the District to the communities through which

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1 NSR operates, is there any impediment to NSR that
2 we haven't discussed in granting CSX either
3 trackage rights or allowing those shipments to be
4 rerouted onto NSR lines?

5 A. Aside from everything that I described,
6 one significant, if you will, impediment is our
7 customers. These are their cars. This is their
8 product. They have a significant say in what
9 happens with the handling of their traffic.

10 Q. How does it affect -- wouldn't it
11 affect CSX's customers' cars? How would it affect
12 NSR's cars?

13 A. Okay. Let me go back. These aren't
14 NSR cars. They are not CSX cars. These are the
15 customers' cars. When the customers ship their
16 product, they are, of course, concerned about the
17 risk as well. And when they route it the way they
18 do, if there is going to be a change in the
19 routing such as implied by the D.C. ordinance,
20 they will have something to say about it. These
21 are arrangements made, usually through contracts,
22 that specify the route over which a car will go.

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1 Q. But the rerouting of CSX traffic will
2 not cause the rerouting of NSR traffic, will it?

3 A. I need a little clarity in your
4 question.

5 Q. I was confused because we are really
6 just talking about in these scenarios the

7 rerouting of CSX traffic over NSR's lines.
8 MR. MOATES: I am going to object
9 because he already said about 10 times he doesn't
10 know how much traffic there is. The volume of CSX
11 and the number of trains that CSX would have to
12 operate with trackage rights would have a very
13 serious effect on Norfolk Southern's operations.
14 But he would only be speculating. Are
15 you telling him one train a day, five trains a
16 week?
17 MR. CASPARI: He can say that. I told
18 him --
19 MR. MOATES: The questions don't make
20 any reference to the amount of traffic CSX
21 operates on NSR's tracks.
22 MR. DOUGHERTY: We were exploring the

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1 NSR policy of not accepting, not consenting to
2 these shipments, and you were asked why and you
3 said because of customer preferences. I think the
4 response was this concerns NSR's customers, but it
5 is CSX's customers who make the shipments. So why
6 would that affect NSR's policies, someone else's
7 customers?
8 THE WITNESS: Let me start over. The
9 original question was, are there any other
10 impediments to CSX traffic to operate over NSR
11 track, and in addition to what I said earlier
12 about our concerns about risk, the magnifying
13 effect of other communities, the congestion
14 inherent that comes from disrupting a network
15 operation, I also said there is an effect on the
16 customer.
17 The customers of CSX also are customers
18 of Norfolk Southern as well as all the other Class
19 1 railroads in North America. And when those
20 customers make agreements to route traffic, they
21 are making the agreement, say in this case, to
22 route it by the way CSX is handling it today. I

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1 don't know personally, but it is highly likely
2 that what I am saying is correct.
3 So if you are going to change that,
4 those customers have a say in that change, because

5 it affects -- if they don't have the cars to
6 support it, their customers are going to be
7 affected. If they don't have the product, the
8 additional amount of chlorine or LPG or whatever
9 the commodity is, in the pipeline to support it,
10 it is going to affect their customers.

11 So I interpreted your word "impediment"
12 to include other significant factors in a
13 decision, and the customers' position on this
14 would be quite significant.

15 Does that answer it?

16 BY MR. CASPARI:

17 Q. Yes, sir.

18 But the decision of whether to consent
19 to the proposal and address these risks, deal with
20 these risks, mitigate these risks, is a policy
21 decision of NSR. It is something that they could
22 agree to do if they wanted to. Is that a fair

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1 statement?

2 A. I believe we could agree to it if we
3 wanted to. But we take the position that I say in
4 my affidavit for all the reasons I said earlier.

5 Q. Is there a volume of hazardous
6 materials traffic that you believe would be
7 acceptable to NSR's capability or the rail lines
8 in Osborne No. 3?

9 A. You got to say that again. I didn't
10 get that at all.

11 Q. I'm sorry.

12 You are talking about diverting large
13 volumes. Is there a number, amount of rail
14 traffic that NSR could absorb on these lines
15 identified in Osborne 3 that would not cause the
16 problems referenced with service disruptions?

17 A. I think you are taking the question out
18 of context. You are referring to, is there a
19 volume of traffic that we would accept under this
20 diversion scenario, and the answer is none. We
21 would not be willing to accept any traffic because
22 the penultimate position has to do with what we

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1 are saying about risk.

2 MR. CASPARI: Mr. Osborne, I don't have

3 any further questions. I thank you.
4 MS. MULLEN: It is 12:30.
5 (Recess.)
6 EXAMINATION BY COUNSEL
7 FOR THE SIERRA CLUB
8 BY MR. BLITZ:
9 Q. My name, again, is Marc J. Blitz. I am
10 an attorney with Wilmer Cutler Pickering Hale &
11 Dorr, and I am here today representing the Sierra
12 Club.
13 If you look at Osborne 1, Exhibit 1 --
14 A. Yes.
15 Q. -- I am looking in paragraph 14 at
16 where you state "A substantial volume of NSR
17 traffic, including hazardous materials traffic, is
18 interchanged with other railroads, including CSX
19 Transportation."
20 Do you see that?
21 A. Yes.
22 Q. And is a correct understanding of your

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1 earlier testimony that when Norfolk Southern
2 accepts this interchange traffic from CSX it is
3 not required to do so by common carrier
4 obligations?
5 A. To repeat what I said earlier, Norfolk
6 Southern's common carrier obligation is to
7 shippers. It is not related to railroads. So
8 when you move traffic in interchange, you are
9 moving it as per arrangements made with customers.
10 Q. Pursuant to trackage rights agreements
11 or interchange agreements?
12 A. Not necessarily trackage rights
13 agreements. The reference in 14 is to
14 interchange.
15 Q. And is Norfolk Southern constrained in
16 any way when deciding whether to accept
17 interchange traffic from CSX or another carrier by
18 its common carrier obligations?
19 MR. MOATES: I think you are asking him
20 a legal question.
21 But if you think you can answer it.
22 THE WITNESS: I'm not sure I can. I

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1 have to know what you mean by "constrained."

2 BY MR. BLITZ:

3 Q. Let me put it this way. As far as you
4 are aware, could it close all of its lines to all
5 CSX shipments that CSX wishes Norfolk Southern to
6 accept?

7 A. I have to answer your question by
8 clarifying. It is not CSX that is the driver. It
9 is the customer that is the driver. So if there
10 is an interchange that is necessary to be used in
11 order for a customer to effect a shipment and that
12 customer meets all the other requirements, then we
13 as a common carrier are obligated to accept the
14 traffic. It is not related to CSX. It is related
15 to the customer.

16 Q. Okay. Just so I understand, if a
17 customer has arranged to ship materials with the
18 most efficient route involving CSX lines as well
19 as your lines, an interchange will take place even
20 in the absence of any agreement between CSX and
21 Norfolk Southern, is that correct?

22 A. There still has to be an agreement

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1 between NS and CSX as to how an interchange will
2 work. But I believe you were asking the question
3 in the context of the common carrier obligation.
4 The interchange exists to facilitate compliance
5 with common carrier obligations.

6 Q. Are there ever cases where CSX couldn't
7 transport a shipment to the destination requested
8 by a shipper unless Norfolk Southern agreed to
9 enter into a trackage rights agreement or other
10 agreement allowing interchange?

11 A. I can't answer. There is too much in
12 that question. I'm not sure what you are getting
13 at for me to answer it.

14 MR. MOATES: I don't want to interrupt.
15 Maybe I can help because I see you are struggling.
16 Trackage rights agreements don't have anything to
17 with interchange. Interchange agreements are
18 related, as the name implies, to the transfer of
19 cars between railroads. Trackage rights
20 agreements refer very specifically to one
21 railroad, as Mr. Osborne testified, operating on
22 the lines of NSR. I think you are losing him on

1 mixing the two.

2 THE WITNESS: That is correct.

3 Trackage rights are different than interchange.

4 BY MR. BLITZ:

5 Q. I guess my question is, are there
6 circumstances where a shipper couldn't have a
7 shipment delivered to its intended destination
8 without an interchange agreement between Norfolk
9 Southern and CSX?

10 A. Yes. But at the risk of further
11 confusing, if a shipment originated on Norfolk
12 Southern and terminated on Norfolk Southern, there
13 is no reason for an interchange agreement. So
14 there are cases where an interchange is not
15 necessary because there is some traffic that
16 doesn't get interchanged. I am not trying -- I am
17 just trying to understand what you are getting at.

18 Q. I was asking whether there are other
19 circumstances where an interchange agreement would
20 be necessary in order for a shipper to have his
21 shipment transported by rail to its intended
22 destination. I understand the answer is yes.

1 A. Yes, it is. And for a significant
2 portion of the rail traffic in North America
3 that's true.

4 Q. In those circumstances where it is
5 necessary, is Norfolk Southern then free to refuse
6 to enter into the interchange agreement that would
7 be necessary?

8 MR. MOATES: Again, counsel you are
9 asking him a question of law. You are asking
10 nuances of the Commerce Act.

11 Joe, if you think you can answer, you
12 can answer.

13 THE WITNESS: Again, as I said before,
14 the only thing I can say -- and, again, I am not
15 familiar with the legal requirement -- is the
16 interchange exists because of the obligation for
17 common carriage. I am not aware otherwise absent
18 that anything that would, you know, require,
19 legally require that interchange arrangements be
20 made. That I am aware. I don't know.

21 BY MR. BLITZ:

22 Q. Let me ask this question. Are you

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1 aware of any circumstances where Norfolk Southern
2 has refused to enter into an agreement that would
3 be necessary, an interchange agreement that would
4 be necessary for a shipment to reach its intended
5 destination?

6 A. Not that I am aware of.

7 Q. Are you aware of circumstances where
8 Norfolk Southern has refused to enter into an
9 interchange agreement that would be necessary for
10 a shipment to reach its intended destination
11 through the most efficient routing available?

12 A. Let me repeat the question. Am I aware
13 of any instance where Norfolk Southern has refused
14 to enter into an interchange agreement that would
15 facilitate the most efficient routing?

16 Q. Right.

17 A. I am hung up on the words "most
18 efficient routing." It depends on where it is
19 going. But assuming that where it is going fits
20 the routing, fits the definition of the term
21 "efficient routing," I am not aware of Norfolk
22 Southern refusing to enter into an interchange

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1 agreement.

2 Q. Are you aware of any circumstances --
3 do you recall any instances in which Norfolk
4 Southern has refused to enter into any interchange
5 agreement proposed to it?

6 A. Not that I'm aware of. Again, you are
7 talking about a vast population of possibilities,
8 but I am not aware of any.

9 Q. And when such interchange agreements
10 or, for that matter, trackage rights agreements
11 are negotiated, is Norfolk Southern always aware
12 of what volume of hazardous materials such
13 agreement would enable to be shipped -- would
14 enable to be transported over Norfolk Southern's
15 lines?

16 A. You are describing two separate things
17 here. They are not the same.

18 Q. We will take them one at a time.

19 A. In interchange, again, under common
20 carrier obligation, we have interchanges. And
21 though I don't have specifics, we are aware of the
22 amount of hazardous material traffic that moves

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1 over these interchanges.
2 Trackage rights agreements are done for
3 business purposes, where both carriers that are a
4 party to the traffic rights have specific benefits
5 they are getting out of the arrangement. And
6 usually it includes some specificity as to what it
7 is that will be allowed to be handled under a
8 trackage rights agreement. And there are all
9 kinds. There are little ones, you know, to
10 facilitate some local operation necessity that
11 needs to be done. There are some large ones in
12 which a large customer involves two railroads in
13 which there is trackage rights involved.

14 But they are fundamentally done for
15 business purposes; and as I said at the very start
16 of the previous thing, they tend to be voluntary,
17 specific, mutually agreed to arrangements.

18 Q. Do they always specify maximum volumes
19 of materials that will move through?

20 A. I don't know. I am just -- just in the
21 course of my experience they have some
22 characteristics that are specific, that describe

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1 the business purpose for which the trackage rights
2 agreement was done.

3 Q. Those agreements that enable
4 transportation of hazardous materials over Norfolk
5 Southern's lines, of those that you can recall,
6 have they specified the volume of hazardous
7 materials that would travel over Norfolk
8 Southern's lines?

9 A. Of the ones that I am familiar with,
10 the volume piece is not explicitly stated, but how
11 it is characterized is in terms of numbers and
12 time, et cetera, in which trains can operate.

13 Q. And with respect to interchange
14 agreements, when such an agreement is entered into
15 by Norfolk Southern and, say CSX, do both carriers
16 know what volume of hazardous shipments will be

17 traveling, say, from CSX's lines onto Norfolk
18 Southern's lines?

19 A. I can't really answer that question.
20 The reason is because the interchanges that I am
21 familiar with were established before I was born,
22 and I don't know what the parties thought at the

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1 time the interchange agreements were done. I'm
2 not aware of any recently established
3 interchanges, let alone what went into the
4 discussion.

5 Q. What is the average time frame of those
6 interchange agreements that you are talking
7 about? How long do they apply?

8 A. I wouldn't know. I mean, there is a
9 long time. And I'm not familiar with, you know,
10 the details of those kinds of agreements. I just
11 know there are agreements because it has to
12 specify what each party is going to do at the
13 interchange.

14 Q. But it doesn't -- the way these
15 agreements work -- is this a fair
16 characterization? The way these agreements work,
17 they are set up and after that shipments can move
18 from CSX's lines over a particular interchange to
19 Norfolk Southern's lines without a specific
20 decision made as to each shipment?

21 A. I just don't know. I mean, this occurs
22 on the operating side of our company. And as I

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1 said, a lot of these interchanges are very old and
2 they have obviously old agreements which have been
3 modified from time to time. So I can't -- I'm not
4 sure if I can get any closer to answer your
5 question.

6 Q. Who in Norfolk Southern could answer
7 questions about interchange agreements?

8 A. Oh, I would say our folks in our
9 transportation department probably, based in
10 Atlanta. I am not exactly sure who.

11 MR. BLITZ: Why don't we mark this as
12 Osborne 4.

13 (Osborne Exhibit No. 4 was
14 marked for identification.)

15 BY MR. BLITZ:
16 Q. Do you recognize this document?
17 A. You will have to give me a minute to
18 look.
19 Q. Sure.
20 A. Actually, it looks like there is pieces
21 of two documents here. This last page is the last
22 page of Osborne 1 and --

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1 MR. MOATES: No.
2 THE WITNESS: Maybe I am confusing it.
3 I'm sorry. I didn't read the top. So I correct
4 that. Yes.
5 BY MR. BLITZ:
6 Q. And it is correct then these are the
7 comments that Norfolk Southern submitted to the
8 Surface Transportation Board in support of the
9 position of CSX Transportation for declaratory
10 order?
11 A. I believe so.
12 Q. And turning to the last page of this
13 exhibit, this is a verification you signed and I
14 am looking at the part where it says "I declare
15 under penalty of perjury that the facts set forth
16 in the foregoing comments of NSR Company in
17 support of the petition of CSX Transportation,
18 Inc. for declaratory order are true and correct.
19 Further, I certify that I am qualified and
20 authorized to file this testimony."
21 You see that?
22 A. Yes, I do.

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1 Q. Do you recall signing that?
2 A. Yes.
3 Q. If you turn to page 4, at the very top
4 line of page 4, it says "NSR would elect not to
5 handle certain hazardous products at all absent
6 the common carrier obligation given the inherent
7 risks."
8 You see that?
9 A. Yes, I do.
10 Q. Paragraph 15 of Osborne 1, you stated
11 that "NSR/CSXT interchange traffic included
12 approximately 21,000 cars containing hazardous

13 commodities."

14 Do you know whether any of those 21,000
15 cars contained hazardous products of the sort you
16 are referring to at the top of page 4 of the STB
17 petition that "NSR would elect not to handle" or
18 these comments that "NSR would elect not to handle
19 absent a common carrier obligation"?

20 A. That was a mouthful. Go ahead.

21 Q. Let me break it down.

22 A. Sure.

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1 Q. Page 4 says "NSR would elect not to
2 handle certain hazardous products at all absent a
3 common carrier obligation."

4 A. Got it.

5 Q. When you refer to the 21,000 cars in
6 paragraph 15 --

7 A. Yes.

8 Q. -- do those cars contain any of the
9 products you are referring to?

10 A. In the population of the 21,000 cars?

11 Q. Yes.

12 A. Yes, that is correct.

13 Q. And is it the case that "NSR does not
14 elect to handle" any of those materials in the
15 absence of a common carrier obligation to do so?

16 A. Could you repeat the question. I'm not
17 following the question.

18 Q. Is it fair to interpret the statement
19 in the STB petition as meaning that when NSR
20 handles any of these hazardous products it does so
21 only pursuant to a common carrier obligation?

22 MR. MOATES: "Any" meaning the ones he

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1 identified as the subset?

2 MR. BLITZ: Yes.

3 THE WITNESS: I would just point to the
4 statement, which is "would elect not to handle
5 certain hazardous products," some of which are
6 included in this 21,000 carloads that is
7 referenced in my affidavit, "at all absent a
8 common carrier obligation" because of the inherent
9 risk.

10 BY MR. BLITZ:

11 Q. Could you specifically identify which
12 "certain hazardous products" Norfolk Southern was
13 talking about there?

14 A. Norfolk Southern was talking about this
15 exhibit.

16 Q. Exhibit 4, top of page 4.

17 A. For instance, there are shipments of
18 chlorine that we would rather not handle that are
19 included in this population of 21,000 carloads
20 that, again, absent the common carrier obligation,
21 we would not want to handle.

22 Q. So wherever Norfolk Southern has the

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1 option of not handling those shipments, it
2 doesn't. Is that fair?

3 A. No, because we don't have the option of
4 not handling it. Am I missing something?

5 Q. Well, let me ask this question then.
6 Are there certain chlorine shipments that Norfolk
7 Southern doesn't have the option of handling?

8 A. Are there certain chlorine shipments --

9 Q. Carried on Norfolk Southern's lines
10 that Norfolk Southern has the option of not
11 carrying on its lines?

12 A. No, because as it is said right here
13 and as I have said throughout this whole
14 deposition we have a common carrier obligation.

15 Q. And that includes chlorine shipments
16 that are transported from CSX's lines onto Norfolk
17 Southern's lines?

18 A. That is correct. That includes those.
19 We are still obligated to handle them.

20 Q. And just to be clear then, trackage
21 rights agreements don't permit CSX to transport on
22 Norfolk Southern's lines chlorine shipments that

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1 it would be free to keep out of its network?

2 A. I don't know. I don't know the
3 population of trackage rights agreements so I
4 can't answer the question.

5 Q. Let me now turn to your statement on
6 paragraph 19 of the affidavit that "NSR would not
7 consent to any proposal to divert large volumes of
8 CSX's hazardous materials traffic to NSR's lines."

9 Based on how you have testified, is it
10 fair to say that "large volumes" there is
11 redundant; that there are no volumes of CSX's
12 hazardous materials that you would accept on NSR's
13 lines?

14 A. As I said at the end of the deposition
15 before, and again for the reasons that I said
16 before, again to repeat, the inherent risk nature
17 of transporting these commodities, as I allude to
18 in Osborne 4, the fact that there are likely to be
19 other municipalities that will adopt similar
20 measures that further increase the risk as well as
21 add to the congestion, the cost to our customers,
22 as I described before, of the effects of such

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1 ordinances, as well as the threat of congestion
2 and the effects on the fluidity of service
3 networks, Norfolk Southern is not willing to
4 handle or willing to agree to handle these
5 commodities on our lines as described in 19.

6 Q. Right. But 19 says "large volumes" and
7 I understand you to be saying now that even if it
8 is a small number of cars, you still wouldn't
9 accept traffic diverted from CSX.

10 A. That's correct. "Large" was not meant
11 to be descriptive. You asked a specific
12 question. I described the reasons for our
13 position. We are not willing to enter into
14 arrangements to allow for diversion of traffic
15 because of those reasons I said.

16 Q. You mean diversion of traffic
17 specifically as a result of the D.C. Act?

18 A. Yes. Again, for the reasons that I
19 said a number of times earlier.

20 Q. Did CSX ever propose to Norfolk
21 Southern that it accept hazardous materials
22 traffic diverted as a result of the D.C. Act?

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1 MR. MOATES: The question has been
2 asked and answered.

3 But do it again.

4 THE WITNESS: To my knowledge, no.

5 BY MR. BLITZ:

6 Q. So there has been no discussion of what

7 the details of an agreement that allowed for
8 diverting of such material would entail?
9 A. Isn't it obvious from my previous
10 answer?
11 Q. So the answer is no?
12 A. I am not aware of any discussions
13 between CSX and Norfolk Southern on the matter you
14 described.
15 Q. So what caused Norfolk Southern to
16 consider whether it would consent to any proposal
17 to divert large volumes of CSX's hazardous
18 materials traffic to NSR if CSX never asked?
19 MR. MOATES: Object to the form of the
20 question. NSR has not agreed or consented.
21 THE WITNESS: My answer is we have not
22 agreed.

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1 BY MR. BLITZ:
2 Q. Let me ask this question.
3 When did NSR first begin deliberating
4 about whether it would or "would not consent to
5 any proposal to divert large volumes of CSX's
6 hazardous materials traffic to NSR's lines" as
7 described in paragraph 19 of your affidavit?
8 A. I am not sure exactly when Norfolk
9 Southern as a company started discussions. I do
10 know that there was a fair amount of discussion
11 that came about as a result of the actions by the
12 Washington, D.C. City Council on this matter.
13 Q. If you look at page 3 of Osborne 4, I
14 am looking at the very bottom of page 3, which
15 says "NSR would not consent to any proposal to
16 divert CSX hazardous materials traffic to NSR's
17 lines." And it does that after referring to the
18 Notice of Objection of the District of Columbia to
19 the Board's decision of February 8th. I am
20 looking at lines three and four of that
21 paragraph. This was served February 9, 2005.
22 Do you see that?

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1 A. Yes.
2 Q. Do you know whether deliberations about
3 whether Norfolk Southern would consent to "any
4 proposal to divert large volumes of CSX's

5 hazardous materials traffic to NSR" began before
6 that Notice of Objection was served on February
7 9th?

8 A. I'm not sure. I do not know.

9 Q. Were you involved from the beginning in
10 those deliberations?

11 A. I don't know the answer to that
12 question either.

13 Q. Well, as far as you know, had this
14 issue been discussed before you were first
15 involved in deliberations about what you say in
16 paragraph 19?

17 A. I don't know.

18 Q. When did somebody first contact you or
19 when did somebody at Norfolk Southern first
20 discuss with you the question of whether NSR would
21 or "would not consent to any proposal to divert
22 large volumes of CSX's hazardous materials traffic

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1 to NSR's lines"?

2 A. I'm not sure, and I do know that a
3 conversation, a series of conversations were had
4 with our law department on this question. I just
5 can't recall exactly when.

6 Q. And you can't recall whether these
7 conversations started before or after February
8 9th, 2005?

9 A. I don't know. I don't know.

10 Q. What date was this decision that is
11 expressed in paragraph 19 of your affidavit that
12 "NSR would not consent to any proposal to divert
13 large volumes of CSX's hazardous materials traffic
14 to NSR's lines," what date was that decision
15 finalized?

16 A. Was it finalized?

17 Q. Yes.

18 A. I guess on February 15th of 2005.

19 Q. Is it fair to say that it was finalized
20 in the context of preparing to submit Norfolk
21 Southern's comments on the STB petition?

22 A. I don't know.

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1 Q. Looking again at your statement in
2 paragraph 19, that "NSR would not consent to any

3 proposal to divert large volumes of CSX's
4 hazardous materials traffic," is it Norfolk
5 Southern's position that it won't consent to any
6 proposal to divert railcars on CSX's lines that
7 are empty?
8 MR. MOATES: Hazardous materials rail
9 cars?
10 BY MR. BLITZ:
11 Q. Hazardous materials rail cars that are
12 empty.
13 A. That's correct. It covers both loaded
14 and empty rail cars because there still is a risk
15 that goes along with that.
16 Q. So the reason that you give in here for
17 this decision applies to empty cars? Is that a
18 fair interpretation of what --
19 A. It is a fair interpretation. But you
20 need to understand -- and, again, I have
21 testified to this earlier -- in the hazardous
22 materials world an empty car that had hazardous

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1 materials in it is still considered a hazardous
2 materials car because there is normally residue or
3 residual product in the car and it has to be
4 treated as if it is a hazardous material car.
5 Q. So just to be clear, even if the
6 diversion of cars onto Norfolk Southern's lines
7 included only empty cars, that would still be
8 unacceptable to Norfolk Southern --?
9 A. That's correct.
10 Q. -- under the position you have
11 described in paragraph 19?
12 A. That's correct.
13 Q. Can you recall any times in which
14 Norfolk Southern has refused to allow shipments
15 from CSXT or any other carriers' lines onto its
16 lines because of its predictions about the effects
17 on the safety of Norfolk Southern's lines or the
18 communities on those lines?
19 A. Not that I am aware of.
20 Q. Can you recall any incidents in which
21 Norfolk Southern has refused to accept shipments
22 from another carriers' lines onto its lines

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1 because of concerns about how it would affect the
2 risks of a terrorist incident involving hazardous
3 materials?

4 A. I am not aware of any, but understand
5 that there is quite a bit that goes on within the
6 Department of Homeland Security actions that I am
7 not aware of that could change that answer. I
8 don't know.

9 Q. Is there someone else at Norfolk
10 Southern who would be more familiar with the
11 answer to the question of whether Norfolk Southern
12 has ever refused to accept shipments from another
13 carrier's lines for safety or security reasons?

14 A. The answer is probably yes, but I am
15 not sure who.

16 Q. Is it typical when Norfolk Southern is
17 deciding whether to accept shipments from another
18 carrier's lines that it conducts an analysis of
19 the effect that receiving those shipments would
20 have on the safety of its lines or the communities
21 on its lines?

22 A. As I said earlier, Norfolk Southern,

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1 along with other rail carriers, looks for ways to
2 reduce risk. And that's an ongoing effort, not
3 only with our company but also with the rail
4 industry. So we think of things or look at things
5 that are covered by your question.

6 Q. But does it do that with respect to
7 each proposed interchange of materials?

8 A. It would affect any interchange because
9 it is not the interchange. It is the risk
10 associated with hazardous materials that is
11 involved.

12 Q. So whenever it has the option of not
13 carrying materials on its rails, it will conduct a
14 safety analysis in that circumstance? Is that
15 fair?

16 A. We don't have the option of not
17 handling it. So I can't answer your question
18 because the predicate of your question is not
19 correct.

20 Q. Is it correct -- am I correctly
21 understanding your testimony earlier that you
22 don't have a specific knowledge of the volume of

1 hazardous materials traffic that would be diverted
2 to NSR's lines as a result of the D.C. Act?

3 MR. MOATES: That has been asked and
4 answered about five times. I don't know what your
5 purpose is. He was asked this three or four
6 times. He says he has no idea. How many times
7 does he have to say it? He doesn't know. We are
8 being reasonable, but this is getting --

9 BY MR. BLITZ:

10 Q. You have no idea how many additional,
11 above the 21,000 already on the Norfolk Southern
12 system, interchange cars containing hazardous
13 materials Norfolk Southern would receive as a
14 result of the D.C. Act?

15 A. At the risk of violating protocol, can
16 I ask how many times that question has been asked
17 already and I have answered?

18 MR. MOATES: About 15.

19 MR. DOUGHERTY: You made your point.

20 THE WITNESS: Okay. I do not know, in
21 answer, as I said earlier.

22 BY MR. BLITZ:

1 Q. In reaching the decision expressed in
2 paragraph 19, did you or others involved in this
3 decision at any point quantify the current
4 probability of an accidental hazardous materials
5 release on the affected or what you would expect
6 to be the affected portion of the Norfolk Southern
7 lines?

8 A. I have no knowledge of such
9 quantification.

10 Q. Did you or any others involved in this
11 decision attempt to quantify or otherwise measure
12 how the probability of a release of hazardous
13 materials would change as a result of the
14 diversion of materials you describe in paragraph
15 19?

16 A. I do not know.

17 Q. In analyzing how the diversion of
18 materials described in paragraph 19 would affect
19 the inherent -- I'm sorry -- would change the risk
20 of hazardous materials release on Norfolk

21 Southern's lines, did you quantify or otherwise
22 attempt to measure or did anyone else involved in

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1 the decision attempt to quantify or measure the
2 likelihood of a terrorist attack on a hazardous
3 materials shipment on Norfolk Southern's lines?

4 MR. MOATES: That's been asked several
5 times too.

6 THE WITNESS: And I don't know.

7 MR. MOATES: He said that about five
8 times. Hopefully, your questioning isn't going to
9 be repeating everything. Are we about done?

10 BY MR. BLITZ:

11 Q. Did you or anybody else involved in
12 this decision analyze the differences between the
13 risks that different cities would be subject to a
14 terrorist attack?

15 A. I do not know.

16 Q. Do you recall discussing the question
17 of whether Washington, D.C. is more likely to be
18 subject to a terrorist attack on a hazardous
19 materials shipment than any of the locations on
20 Norfolk Southern's lines?

21 A. I have to ask you to repeat the
22 question.

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1 Q. Did you discuss the relative likelihood
2 that Washington, D.C. and the locations through
3 which this diverted material would pass on Norfolk
4 Southern's lines, the comparative likelihood that
5 those locations would be subject to a terrorist
6 attack?

7 A. And my answer is I did not discuss as
8 you described.

9 Q. And you are not aware of anyone else
10 discussing that?

11 A. I do not know of anyone else. Your
12 question was specific to me. I do not know. Your
13 second question was am I aware of anyone. I do
14 not know.

15 Q. So the statement you make in paragraph
16 19 was not to your knowledge based on any such
17 analysis?

18 MR. MOATES: If he doesn't know of any

19 such analysis and he didn't make it and he didn't
20 know anybody else did, how could the statement be
21 based on it?

22 THE WITNESS: Correct.

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1 MR. BLITZ: I don't have any more.

2 MR. MOATES: Two minutes.

3 MR. DOUGHERTY: I said two and a half.

4 BY MR. DOUGHERTY:

5 Q. After six hours of no food and no
6 caffeine, I get cranky, so I commend your
7 fortitude and good natured forbearance.

8 Can I refer to the map, Osborne 3?

9 A. Yes.

10 Q. NSR provides railroad shipment service
11 to shippers in Lynchburg, Virginia, right?

12 A. I believe so.

13 Q. On your line, at least that's the way I
14 understand this map.

15 A. Norfolk Southern operates through the
16 town of Lynchburg, Virginia.

17 Q. Right. And if a shipper there wanted
18 to ship, say, chlorine or some other HAZMAT to
19 Richmond, you would accept that shipment, NSR
20 would, isn't that correct?

21 A. As per the common carrier obligation,
22 Norfolk Southern is obligated to accept a shipment

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1 in that theoretical example.

2 Q. But that's on the CSX line, so that
3 would require some interchange, as I understand
4 this map at least? That would require interchange
5 of that cargo from Norfolk Southern to CSX?

6 A. That is not correct. Norfolk Southern
7 operates through Lynchburg. It turns out --

8 Q. It is the same line, okay.

9 A. I just have to point out the map is not
10 clear enough to distinguish who operates where.

11 Q. Right, okay. Let me ask it
12 differently. If someone wanted to ship chlorine
13 from Lynchburg to Baltimore, you would accept that
14 shipment in the same way? I should ask the
15 question --

16 A. Maybe not the same way.

17 Q. Would you accept it?
18 A. I am just saying the common carrier
19 obligation obligates us to accept shipments of,
20 among other things, chlorine if we can or have the
21 means to access wherever the origin-destination
22 points you are talking about.

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1 Q. But Baltimore is not on the NSR rail
2 line, is that correct?

3 A. It is on the NSR rail line.

4 MS. MULLEN: Excuse me for
5 interrupting. There is a particular map that shows
6 in color those particular lines, and it may be a
7 better source.

8 MR. DOUGHERTY: I am at this hour not
9 going to launch into that.

10 MS. MULLEN: It would show clearly
11 their lines and the other lines because I know
12 that is difficult to read.

13 BY MR. DOUGHERTY:

14 Q. One final question. Say you were to
15 accept a HAZMAT shipment from Lynchburg bound for
16 Baltimore. You testified earlier that CSX -- NSR
17 does move HAZMATS through the District of
18 Columbia, is that correct?

19 A. That's correct.

20 Q. So that means that you are shipping out
21 to the west, I take it, through Hagerstown, for
22 example? Is that where that shipment would go?

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1 How would it get from Lynchburg to Baltimore is my
2 question.

3 A. It would operate up northbound to
4 Manassas Junction in Virginia, west to Hagerstown,
5 up to Harrisburg, over to Enola, Pennsylvania, and
6 down the Susquehanna Line to Perryville, Maryland
7 and then over Amtrak down to Baltimore, if that
8 theoretical shipment were to occur.

9 Q. So it would go over Amtrak's lines, you
10 are saying?

11 A. Yes. That is correct.

12 Q. Pursuant to an interchange agreement?

13 A. No. Pursuant --

14 Q. Northeast Corridor?

15 A. Pursuant to a trackage rights
16 agreement.
17 Q. Wouldn't it be shorter and more direct
18 to take that cargo through Washington if NSR has
19 has the right to either interchange the cargo or
20 or ship it themselves?
21 A. Not necessarily.
22 MR. DOUGHERTY: Okay. I think that's

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1 the end of my questioning. Thank you.
2 MR. MOATES: Thank you.
3 (Whereupon, at 1:25 p.m., the taking of
4 the deposition concluded.)
5 (Signature not waived.)
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